No. 91-7358-CFH Title: Todd A. Brecht, Petitioner
Status: GRANTED v.
Gordon A. Abrahamson, Superintendent, Dodge Correctional Institution

Docketed:
February 18, 1992 Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Shoenberger,Allen A.

Counsel for respondent: Gabrysiak,Jeffrey M., Wellman,Sally L.

Entry	Date	Note	Proceedings and Orders
1	Feb 18 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Mar 12 1992		Waiver of right of respondent Gordon A. Abrahamson, Superintendent, Dodge Corr. Inst. to respond filed.
4	Mar 19 1992		DISTRIBUTED. April 3, 1992
5	Mar 31 1992	P	Response requested -- WHR. (Due May 1, 1992)
6	Apr 30 1992		Brief of respondent Gordon Abrahamson, Superintendent in opposition filed.
7	May 7 1992		REDISTRIBUTED. May 22, 1992
9	May 26 1992		REDISTRIBUTED. May 29, 1992
11	Jun 1 1992		REDISTRIBUTED. June 5, 1992
13	Jun 8 1992		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
14	Jun 10 1992	G	Motion of petitioner for appointment of counsel filed.
15	Jun 15 1992		DISTRIBUTED. June 19, 1992
16	Jun 22 1992		Motion for appointment of counsel GRANTED and it is ordered that Allen E. Shoenberger, Esquire, of Chicago, Illinois, is appointed to serve as counsel for the petitioner in this case.
17	Jul 13 1992		Joint appendix filed.
19	Jul 22 1992		Brief amicus curiae of County of Wayne, Michigan filed.
21	Jul 23 1992		Brief amicus curiae of ACLU, et al. filed.
24	Jul 23 1992		Order extending time to file brief of petitioner on the merits until August 14, 1992.
18	Jul 27 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Jul 27 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Seventh Circuit.
22	Jul 29 1992		Record filed.
		*	Original proceedings United States District Court for the Western District of Wisconsin (1 Box)
25	Aug 11 1992		Brief of petitioner Todd A. Brecht filed.
27	Sep 9 1992		Brief amicus curiae of United States filed.
29	Sep 9 1992		Brief amicus curiae of Criminal Justice Legal Foundation filed.
26	Sep 10 1992		Brief amici curiae of California, et al. filed.
28	Sep 10 1992		Brief of respondent Gordon Abrahamson, Superintendent filed.

Entry	Date	Note	Proceedings and Orders
30	Oct 5 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
31	Oct 13 1992		SET FOR ARGUMENT TUESDAY, DECEMBER 1, 1992. (3RD CASE).
33	Oct 13 1992	X	Reply brief of petitioner filed.
32	Oct 15 1992		CIRCULATED.
34	Dec 1 1992		ARGUED.

EDITOR'S NOTE

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91-7358

No.

In The

Supreme Court of the United States

October Term, 1991

ORIGINAL

Todd A. Brecht,

Petitioner,

v.

Gordon A. Abrahamson,
Superintendent, Dodge Correctional Institution,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Allen Shoenberger*
One East Pearson St.
Chicago, Illinois 60611

(312) 915-7141

Counsel for Petitioner

* Counsel of Record

QUESTIONS PRESENTED

I. Whether, when considering violations of *Doyle v. Ohio* in federal habeas corpus proceedings, it is consistent with constitutional due process and the Sixth Amendment right to trial by jury to abandon the standard of review of whether constitutional error was harmless beyond a reasonable doubt and substitute the standard of whether the error substantially affected the course of the trial.

II. Whether the erroneous introduction of evidence at trial relative to Petitioner's homosexuality was so prejudicial that it operated as a denial of his constitutional right to due process of law.

PARTIES

The caption contains the names of all the parties below.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 20, 1991.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. WILBUR F. PELL, JR., Senior Circuit Judge

TODD A. BRECHT,
Petitioner-Appellee,

No. 91-1635 v.

GORDON A. ABRAHAMSON, Superintendent,
Dodge Correctional Institution,
Respondent-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 90-C-603-C
Barbara B. Crabb, *Chief Judge.*

Order

Petitioner-Appellee filed a petition for rehearing and suggestion of rehearing en banc on October 10, 1991. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and a majority of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

E

United States Court of Appeals
for the
Seventh Circuit

91-1635

Todd A. Brecht, Petitioner-Appellee, v. Gordon A. Abrahamson, Respondent-Appellant	) Appeal from the) United States) District Court for) the Western District) of Wisconsin) 90 C 603) Judge Barbara B. Crabb) Presiding

Petition for Rehearing with Suggestion for Rehearing En Banc

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United States Court of Appeals
for the
Seventh Circuit

91-1835

Todd A. Brecht, Petitioner-Appellee, v. Gordon A. Abrahamson, Respondent-Appellant	) Appeal from the) United States) District Court for) the Western District) of Wisconsin) 90 C 603) Judge Barbara B. Crabb) Presiding

Petition for Rehearing with Suggestion for Rehearing En Banc or in the alternative a Request for Modification of the Opinion, and Judgment to Remand the case to the District Court for
Application of the Standard Announced in the Panel Decision

This is a case of exceptional importance, for it involves the standard of review of Miranda related claims on habeas petitions in federal courts: the panel decision created a conflict of law between this circuit and the Eighth Circuit in Bass v. Nix, 909 F.2d 297 (8th Cir. 1990) as well as a refusal to apply the harmless error standard articulated by the Supreme Court in Chapman v. California, 386 U.S. 18 (1967), which been left undisturbed by any holding of the United States Supreme Court and last assumed in YLST v. Nunnemaker, 59 U.S. Law Week 4808, 4810, n. 2 (June 25, 1991) in the opinion for the court by Justice Scalia as still cognizable in habeas.

The panel decision in this case is a startling example of the adversarial process going fundamentally awry. Neither the facts nor the legal conclusions and standards stated in the panel opinion have been subjected to comment and analysis by either attorneys for the Appellee or Appellant.

The panel opinion notes that it had been circulated to all Judges of he Seventh Circuit because it creates a conflict between the circuits and changes the standard of review in the circuit. In that

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panel opinion fully 83 percent of all case authorities (65 cases) cited by the court's opinion had neither been cited by the State of Wisconsin nor by Petitioner-Appellee. No law review articles cited in the opinion were cited by either side. Indeed, the change of standard stems from a single footnote invitation to reconsider the harmless error standard contained in Wisconsin's brief on appeal. (Wisconsin did in fact fail to raise that issue at the District Court level, but Counsel for Petitioner-Appellee inadvertently, and incorrectly, believed it had.) No further argument appeared in Wisconsin's briefs. The state's briefs focused, as did Petitioner-Appellee's brief, on the application of the harmless error standard.

Briefing in this case was extraordinarily expedited. Wisconsin filed its original brief on May 24, 1991. Counsel on appeal was not appointed by this court until May 29, 1991. Counsel was required to immediately respond to a substantial motion by Wisconsin to stay release. Appellee's response to Wisconsin's release motion was filed on June 7, 1991. The court granted the government's stay motion on June 18, 1991, and on that same date, without prior notice to counsel for Petitioner-Appellee, ordered both expedited briefing and set oral argument. Petitioner's brief was due by noon of June 24, 1991, and oral argument set for July 10, 1991. Petitioner's attorney had less than 5 days actual notice of the due date of the brief and responded as best possible during that time period considering the extensive record involved.

The difficulty of the case under review is illustrated by the fact that each court in turn to consider the case has reversed the decision of the court which last decided it. Such reversals indicate the closeness of this case, a single issue case: i.e. Whether Todd

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Brecht intentionally killed his brother in law, the District Attorney of Buffalo County, Wisconsin?

There was no contest as to who shot Mr. Hartman, nor was there any contest or dispute about where the shooting took place until the panel decision in this case moved the site of the shooting in blatant disregard for the record. If Mr. Hartman was not shot intentionally, Wisconsin has already held Mr. Brecht beyond the maximum sentence for the lesser offense charged to the jury.

The statement of facts in the panel opinion startlingly and substantially misstates the record, and in substantial part disregards the record. These misstatements are so serious that it is impossible to understand that a difficult task would remain in applying the new standard to the complex facts of the case to the only issue at dispute - intent.

At oral argument it was distinctly insisted, and Todd Brecht continues to insist, that under any standard of review short of complete deference to the last state court decision, Mr. Brecht is still entitled to the grant of the writ under federal law. This includes the standard articulated for the first time in this case (a standard which differs from that asserted by Judge Easterbrook in dissent in, U.S. ex rel. Miller v. Greer, 789 F.2d 438 , at 448 (7th Cir. 1986) which was either: "'had substantial influence' on the course of the trial ...," or "'actual prejudice' ... a significant likelihood of altering the verdict.").

The panel opinion fails to mention the only direct testimonial statement by Roger Hartman, made shortly after the shooting, in direct and apparently full conscious response to a neighbor's question, "Did he [Todd Brecht] have something anything against you?" "ANSWER, I

DON'T KNOW." (Record 164, 175)

The prosecution tried to fill this lacunae on intent with theories of motive based on homosexuality, either irritation about conditions for staying in the Hartman house until another facility would be available, conditions restricting his drinking or homosexual activity in the house, or cupidity, (with a hint of homosexuality) i.e. Brecht's sister would inherit Hartman's property and Brecht could then bail out a "brother" from jail in Georgia. (Brecht would then need $1,000)

The government's lever to move the jury to its view on intent was Todd Brecht's total lack of credibility (R. 608, 619, 791); the lever's fulcrum was Brecht's failure to label the shooting an accident prior to hearing the government's case at trial, [Although Brecht's attorney had stated in opening argument Brecht's accident defense in considerable detail, details that coincided with Brecht's actual testimony to the jury]; and the heaviest weight on that lever were the inferences, surmises and theories based upon Todd Brecht's admitted homosexuality.

Each and every reviewing court has found that federal constitutional error had been committed through the state's adverse comments on silence that embraced the period after arraignment at which Miranda warnings were first documented to have been given.

Besides the important new ruling of law, the panel of this court made new and creative findings of fact, and inferences of fact which themselves cannot withstand adversarial testing (many of these findings of fact and theories have never been advanced by the state). Many findings of fact and arguments are squarely contradicted by the evidence actually admitted at trial, as well as contradictory to the

theories and arguments actually advanced by the prosecution at trial.

Among other startling items asserted for the first time in the panel opinion are the following:

1) The site of the killing is moved from inside the house to outside the house (Opinion p. 3, "near the pool (where Roger was shot)";

a) This ignores uncontradicted physical evidence including the spent bullet and cartridge shell found inside the house about 240 inches apart (R. 240, 252, 224, 250-252, 246, 298).

b) It also ignores the only argument by the state to suggest a theory different from the defendant's as to where the shooting occurred, an ambush theory also set inside the house but at a slightly different place on the basement (or lower) level, R. 810, (responded to at R. 845). The prosecution neither argued nor suggested the shooting took place anywhere other than inside the house. Indeed, the prosecution stated the shooting took place inside the house in its opening and closing statements (R. 116, 812, 881).

c) Most importantly it ignores Roger Hartman's own statement, "I sneaked out the basement door..." (R. 167) which puts the shooting inside the house. Persons at the house where Roger sought assistance also understood the shooting took place in the basement and told police officers that (R.221).

2) A pool is moved around the house to the patio side (sometimes referred to as the porch), "The rifle was found on the patio near the pool (where Roger was shot)" (Opinion, p. 3). Nowhere in the record is the patio stated to be near the pool although such

confusion is understandable considering the complex testimony in the case and the failure to have a single exhibit on appeal diagramming the house. (The opinion also moves the master bedroom from one floor to another; see item 9 below.)

3) The opinion fabricates a non-existent, "raided" gun cabinet (Opinion, p. 2) as the source of the weapon, although all testimony indicates guns were stored inside bedroom closets, and the weapon involved came from Todd Brecht's bedroom closet, (R. 406, 582, 267-68).

4) Cans of beer that are testified to have come from a refrigerator (R. 581), instead come from a liquor cabinet never mentioned in the record, (Opinion p. 2), (liquor bottles were underneath a bar (R 573, 274, 127). Neither gun cabinet nor liquor cabinet appears anywhere in the record.

5) The word "assassin" was introduced as if it was used by the decedent (which it was not), and indeed the only time anything vaguely similar to such a word was employed, the word "assailant," the trial judge ordered the word struck from the record. (R. 154)

6) The caution by the Hartmans that Brecht was not to engage in homosexual activity at their home is dramatized by the panel opinion as "at the prison gate," (Opinior p. 2) which contradicts the only specific information in the record, Molly Hartman's possibility that it was discussed on the ride home from Georgia to Wisconsin (R. 417) and Todd Brecht's statement that it was discussed on the way back from Georgia (R. 571). (The importance of the house rule is thereby dramatized by suggesting that Brecht would have remained in prison if he didn't accept this house edict!)

7) Highly probative facts are ignored, including the

statement by Mr. Hartman that he didn't know what reason Brecht may have had against him, (R. 164, 175), and that the Todd Brecht, despite his motivation from cupidity, fled the scene without weapon, credit card, or checks, but with 25 cents in his pocket. (R. 361, 364 (or $1.30, according to Brecht (R. 598))

8) The court describes Brecht as a heavy drinker, a term neither used by witnesses nor by attorneys.

9) Unclear facts are stated as givens. These facts include a finding that Brecht made the phone system inoperative by taking a phone off the hook upstairs (Opinion p.2) [which also moves the Hartman bedroom from downstairs to upstairs: The phone in kitchen wall was on the hook, (R. 222, 244) police went downstairs where there was a bedroom, (R 223) a master bedroom (R. 247, 253) where the phone was off the hook (R. 255), which is the level at which the shooting took place.] In fact Todd Brecht testified he could not remember leaving the phone off the hook.(R. 645) [Indeed, it was not until October 8, 1991, that it occurred to counsel for Mr. Brecht that the open phone in the downstairs bedroom could have been caused by Mr. Hartman between the time he was shot, and the time he sneaked out of the basement to seek aid at a neighbors house. (R. 883) During this period of time it is clear that Todd Brecht did not know where Roger Hartman was. This argument is also one never advanced to the jury, thus outside the record, but also is more consistent with the trial record than many of the theories advanced by the panel opinion.]

Most of these particular inaccuracies were artfully employed by the panel opinion to suggest irrefutable evidence of an intentional killing.

Other inaccuracies include the statement, "Twice the

prosecutor asked Brecht whether he told anyone at any time before trial that the shooting was accidental..." (p. 4) Such questions were in fact 'never' asked of Mr Brecht.

The actual questions asked of Brecht are contained in the District Court opinion at 759 F.Supp. 504.

Such fundamental factual problems in exploring the complex record in this case demonstrate the wisdom of the ordinary appellate practice of leaving primary responsibility for factual analysis to trial courts, and limiting the role of appellate panels to scrutiny of the results of the trial court. The danger of error is real if a judge with a "burning interest" in an issue (Concurring Opinion, p.25), however important the particular issue, makes the case fit the issue.

The principal issue of law decided in the panel opinion (an issue on which 5 judges voted to rehear en banc,) was mentioned only in a brief footnote to the government's initial brief. At oral argument, brief discussion of the substance of alternative standards of review on habeas took place. Petitioner's position was that under any standard of review chosen by the court, including, the standard set out in the panel opinion, a retrial was required because the constitutional errors fundamentally tainted the truth finding function of the jury at Petitioner's trial.

The panel decision in this case resolves an important issue of federal law and creates a conflict between the circuits on the basis of virtual total absence of briefing and argument about the important policy and legal matters involved. In the short time available to file a brief in this case, Petitioner responded with a statement of the existing standard, and subsequently by letter noted a recent Supreme Court decision which inferentially continued the validity of

that standard, Yates v. Evatt, 111 S.Ct. 1884 (1991). Counsel was not aware of the footnote in YLST v. Nunnemaker, 59 L.W. 4808, 4810, n.2 (1991) which reflects the court's assumption that Miranda claims were still cognizable on habeas at least as of June 25, 1991. (YLST was not cited in the panel opinion.)

There are substantial legal issues that Appellee would request permission to brief that are important to its consideration of the proper role of federal courts in exercising habeas corpus jurisdiction. The panel opinion states that the Supreme Court has overruled Fay v. Noia, 372 U.S. 391 (1963) citing Coleman v. Thompson, 111 S.Ct. 2446, 2565 (1991). That is incorrect, although some other courts have also drawn the same conclusion.

Fay v. Noia, was indeed modified by the adoption of a cause and prejudice test in Francis v. Henderson, 425 U.S. 536 (1976),and Wainwright v. Sykes, 433 U.S. 72 (1977), and most recently Coleman v. Thompson, 501 U.S. ___, 115 L.Ed. 2d 640, 111 S.Ct. ___(1991). Indeed, review of the specific holdings stated in Fay v. Noia by Justice Brennan at 372 U.S. 398-399 indicates that most of Fay v. Noia continues to be an accurate description of habeas corpus law, and in particular federal jurisdiction continues to exist in section 2254 cases. The fundamental relationship of state and federal law contemplated by Fay v. Noia, has not been drastically altered, certainly not as much as premature reports of Fay v. Noia's demise might indicate.)

What is true about Fay v. Noia, is that specific applications such as the deliberate bypass test are no longer applicable and instead a cause and prejudice test applies. Coleman v. Thompson, 501 U.S. ___, 115 L.Ed. 2d 640, 669, 111 S.Ct. ____. Until either the

Supreme Court or Congress acts further, the essence of Fay v. Noia persists and that is a command that federal courts are to scrutinize the basis for detention simpliciter.

However, the present case doesn't involve any argument regarding failure to raise and preserve constitutional allegations.

It is also true that although Fay v. Noia has been substantially modified by subsequent decisions of the Supreme Court, its original holdings as then stated, are surprisingly unmodified and remain at the core of Section 2254 jurisprudence. Fay v. Noia's major impact was recognition of the fundamental reallocation of federal and state power accomplished by Section 2254.

That is the major issue presented by the panel opinion in this case: The proper allocation of federal and state power in this area.

Fifth amendment rights to remain silence are not just constitutional claims, they are a fundamental protection against government overbearance upon the individual. The Miranda guarantee that relates to the right to remain silent is fundamentally different from Stone v. Powell, 428 U.S. 465 (1976) issues. Unconstitutionally obtained physical evidence does not lose its capacity to demonstrate truth through police malfeasance. A gun or bag of cocaine doesn't become untrue just because the constable blundered.

That is not the case with compelled utterances from defendants, or with penalizing the right to remain silent. Such penalties exert just that form of governmental overbearance that is at the core of the Fifth Amendment privilege. On the one hand, silence is itself neither "true" nor "untrue" regardless of whatever half-baked psychological assumptions some people may believe. Neither is speech itself always true, including confessions to murder.

Indeed, counsel is aware of the intense skepticism of Chicago homicide detectives to homicide confessions. Frequently such persons, even after passing lie detector tests, have been demonstrated not to have committed a murder, usually by finding the actual murderer along with physical or other evidence establishing truth in the matter.

Brecht's statements prior to trial are not at issue in this case. They include his statements to or overheard by police that it was a "big mistake" (R. 721, 723), or his telephone conversation from the jail on the night of his arrest that "he didn't want to shot anybody, and didn't mean to kill anybody, and didn't mean for anybody to get murdered" (R. 727). [Nor does this explain the government's failure to attempt to rebut Brecht's claimed statement on the night of arrest to his stepfather that it was an accident (R. 601) (By calling his stepfather).] [It is also unclear in the record why another statement by Brecht was not submitted to the jury, a statement shortly after his arrest that "he was always running from something he did not do." (R. 60)]

The undisputed issue in this case is the potential effect on the jury of the state's repeated use of Brecht's silence to impeach him before the jury with comments and questions that clearly violated his constitutional rights.

The essence of the writ of habeas corpus is testing the legality of restraint of an individual.

By denying the application of the adequate and independent state ground doctrine, Fay v. Noia held that a case or controversy existed permitting federal courts to decide the original Section 2254 action. Such cases are not a further level of appeal of state criminal actions. Section 2254 cases continue to be "original civil

remedies for the enforcement of the right to personal liberty." As stated in Fay v. Noia, "The jurisdictional prerequisite is not the judgment of a state court but detention simpliciter."372 U.S. 430, 9 L.Ed. 2d 864. Coleman v. Thompson, itself recognizes a continued, albeit narrowed, role for federal courts in such cases.

Until either Congress or the Supreme Court decides that the scope of this fundamental writ should be narrowed, a writ so fundamental it was not left to the bill of rights but mentioned in the original body of the Constitution, (Article I, Section 9, cl. 2, Suspension Clause) and included in the Judiciary Act of 1789, Section 14, 1 Stat. 81, 82., with all due respect it is submitted this court should not act to limit that writ. It is particularly inappropriate when the request was neither presented to the U.S. District Court, nor briefed to this court. The apparent rush to judgment presented in the appellate representation of Todd Brecht accentuates the problem.

Moreover, the reason for not speaking first asserted at trial by Todd Brecht distinctly was that he did not want to give up his rights by speaking. (759 F. Supp. 504) This is an assertion that he did not want to give up a right, understandable in context as a federal right, which presents the type of claim recognized in Carrington v. Rash, 380 U.S. 89 (1965). Such a claim parallels the first federal use of habeas corpus against state custody, a use that predates the 1867 federal statute discussed in the panel opinion at 16-17. That use was to protect persons acting under federal authority who were being detained in state custody, a reaction to the North Carolina Nullification ordinance. Force Act of March 2, 1833, c. 57, sec. 7, 4 Stat. 434, 435. See, Fay v. Noia, 371 U.S. 401, n. 9.

Since the panel opinion fails to identify any opinion of a

Justice of the Supreme Court suggesting the application of the standard adopted by the panel to Miranda right to silence claims, since it appears to have ignored the YLST footnote announced on the same day as Coleman v. Thompson indicating such claims retained vitality, and since the adversarial process has so fundamentally gone awry in this case:

The Appellee respectfully requests a rehearing and suggests a rehearing en banc; in the alternative, Appellee requests that this court modify its opinion to correct the many errors unsupported by the record and remand this case to the District Court for consideration of the application of this court's standard to the facts of the case. In the event that either rehearing is ordered or the suggestion for rehearing en banc is accepted, it is suggested that Appellee be permitted to file a brief on the appropriateness of any alteration of the harmless error standard, the appropriateness of alternative standards, and the application of alternative standards to the facts of the instant case. Appellant should be given similar opportunity to file briefs.

Respectfully submitted,

Allen E. Shoenberger
Court Appointed Counsel

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disturb trial court's findings of fact which are not clearly erroneous. Sec. 805.17(2), Stats. The finding is not clearly erroneous. Walter Szczesny testified that in 1979 he gave Padgett permission to clear the land. When Szczesny visited the land in 1981 he saw that it had been partially cleared. He did not see the land in 1982. There is no evidence that before or during 1982 Padgetts had acted inconsistently with Szczesnys' consent.

[6] The Szczesnys object to Padgetts' having farmed the land. Padgetts testified that they did not farm the land until after 1982, and the record contains no evidence to the contrary. By August 1983 Szczesny observed that the land had been planted and grazed. The parties agree that this was done without consent, and Szczesnys argue that it renders the trial court's finding erroneous. We disagree.

As of July 10, 1982, when Padgetts accepted the offer, they had an equitable interest in the land and were entitled to a deed within a reasonable time. After tender of the full purchase price on August 19, 1982, Padgetts were entitled to use and possess the land as its owners. The trial court's finding that Szczesnys' claim of trespass fails for lack of proof is not clearly erroneous.

We therefore affirm the judgment ordering specific performance of the contract conveying the five-acre parcel in the Town of Necedah from the Szczesnys to the Padgetts.

Because Szczesnys' challenge to the contract was brought in good faith, with reasonable basis in law, we deny Padgett's motion for costs and fees.

Judgment affirmed.

138 Wis.2d 158
STATE of Wisconsin,
Plaintiff-Respondent,
v.
Todd A. BRECHT, Defendant-Appellant.
No. 86-1317-CR.

Court of Appeals of Wisconsin.

Submission on Briefs Jan. 16, 1987.
Opinion Released March 17, 1987.
Opinion Filed March 17, 1987.
Review Granted.

Defendant was convicted in the Circuit Court, Buffalo County, Peter G. Pappas, J., of first-degree murder with use of dangerous weapon, and he appealed. The Court of Appeals, Myse, J., held that: (1) prosecution's comments on defendant's postarrest, pre-*Miranda* silence, and his postarrest, post-*Miranda* silence were reversible error; (2) evidence of defendant's homosexuality did not suggest motive and thus was inadmissible as irrelevant; and (3) by calling his probation officer to testify as to her opinion of defendant's nonassaultive, nondangerous character, defendant would not have opened door to allow State to introduce evidence of defendant's prior worthless check convictions, as cross-examination of probation officer concerning prior worthless check convictions would have been totally unrelated to question of character trait of nonviolence.

Reversed.

1. Criminal Law ⇐720(1)

No governmental action was involved, and thus prosecutor could comment on defendant's prearrest, pre-*Miranda* silence, including defendant's failure to aid victim or summon medical assistance, and his flight from scene. U.S.C.A. Const. Amends. 5, 6, 14.

2. Criminal Law ⇐407(1)

State's repeated questioning of defendant on his silence following his arrest and before he was given *Miranda* warnings violated his privilege against self-incrimination under both Federal and State Constitu-

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tions. W.S.A. Const. Art. 1, § 8; U.S.C.A. Const.Amend. 5.

3. **Criminal Law** ⇐720(1)

Defendant did not "open the door" to prosecution's comment on his postarrest, pre-*Miranda* silence; defendant's testimony that he wanted to talk to someone about what happened and that "it was a mistake" was made in response to State's repeated questioning as to why he had never told any law enforcement officer that shooting was accidental. W.S.A. Const. Art. 1, § 8; U.S.C.A. Const.Amend. 5.

4. **Criminal Law** ⇐720(1), 1171.3

State's numerous comments on defendant's postarrest, pre-*Miranda* silence prejudiced defendant and were reversible error; State's references to silence involved detailed recitation as to various opportunities defendant had to explain alleged "accident" to a number of officers, and, since defendant contended that shooting was accidental, his testimony regarding circumstances of shooting and his intentions at that time raised issue of credibility to critical level, and State used his silence as attack on that credibility. W.S.A. Const. Art. 1, § 8; U.S.C.A. Const.Amend. 5.

5. **Constitutional Law** ⇐268(8)

Prosecution's assertions in closing argument that defendant first volunteered his accidental shooting story after State had presented its evidence were comments on defendant's post-*Miranda* silence, violating his right to due process of law. U.S.C.A. Const.Amends. 5, 14.

6. **Criminal Law** ⇐1171.3

Prosecutor's improper comments on defendant's postarrest, post-*Miranda* silence were prejudicial and reversible error; although comments were infrequent, defendant's credibility was undermined by prosecutor's suggestion that his continued silence was proof that he had fabricated accidental shooting story after hearing State's evidence against him. U.S.C.A. Const.Amends. 5, 14.

7. **Homicide** ⇐166(1)

Absent proof that victim had ever communicated his disapproval of defendant's homosexuality to defendant, evidence of defendant's homosexuality did not suggest motive for murder of victim and was inadmissible as irrelevant.

8. **Witnesses** ⇐337(1)

By calling his probation officer to testify as to her opinion of defendant's nonassaultive, nondangerous character, defendant would not have opened door to allow State to introduce evidence of defendant's prior worthless check convictions, as cross-examination of probation officer concerning prior worthless check convictions would have been totally unrelated to question of character trait of nonviolence. W.S.A. 904.04(1)(a), 904.05(1).

Janet A. Jenkins and John Brinckman of Arneson & Jenkins, S.C., La Crosse, for defendant-appellant, Todd A. Brecht.

Bronson C. La Follette, Atty. Gen. and Michael L. Zaleski, Asst. Atty. Gen., Madison, for plaintiff-respondent, State of Wisconsin.

Before CANE, P.J., and LaROCQUE and MYSE, JJ.

MYSE, Judge.

Todd Brecht appeals a judgment convicting him of first-degree murder with the use of a dangerous weapon, contrary to secs. 940.01 and 939.63(1)(a), Stats. Brecht argues that his conviction should be overturned because the state's comments on his post-arrest silence violated his constitutional right to due process of law and his privilege against self-incrimination. Additionally, Brecht contends that the trial court erred by admitting evidence of his homosexuality and concluding that should he introduce evidence of his nonviolent character, the state could introduce evidence of his prior worthless check convictions.[1] We agree that the state's com-

1. Brecht also argues that his conviction should be reversed because of the prosecutor's alleged prosecutorial misconduct. Because Brecht's conviction must be reversed on other grounds, we need not address this issue. See *State v.*

ments on Brecht's silence impermissibly infringed on his right to a fair trial and that the trial court erred in its evidentiary rulings. The judgment is reversed.

In 1985, Brecht was convicted in Georgia of felony theft. In October of that year, Brecht's sister, Molly Hartman, and her husband, Roger Hartman, paid the restitution imposed for Brecht's crime and obtained his release from jail and the transfer of his probationary supervision to Wisconsin. The Hartmans brought Brecht back to Alma, Wisconsin, to live with them until he could be placed in a halfway house.

On October 17, Brecht shot and mortally wounded Roger Hartman. Brecht fled the scene and did not summon medical assistance or attempt to aid Hartman. Later that day, Brecht was taken into custody in Winona, Minnesota, and was told that he was being held in connection with a shooting incident in Wisconsin. Brecht responded that "it was a big mistake" and thereafter remained silent.

Brecht was ultimately charged with first-degree murder. At trial, Brecht testified that on the day of the incident, he had been using one of Hartman's guns to shoot at a soda can. Brecht stated that when he saw Hartman pulling into the driveway, he ran into the house to replace the gun but tripped and fell causing the gun to discharge. Hartman was struck in the back. Brecht testified that the shooting was accidental and that he did not intend to harm Hartman.

Over defense counsel's objections, the prosecutor during cross-examination repeatedly questioned Brecht as to why he had not informed the arresting authorities that the shooting was accidental. With regard to Brecht's silence when first taken into custody, the prosecutor asked:

> Q. And you were being awfully dog-gone selective [sic] as to who you were going to talk to weren't you?
>
> A. I guess I was, yes sir.
>
> ....
>
> Q. And I take it that Officer Papke did not meet your criteria, so you said nothing to him?
>
> A. I didn't say nothing to him, no sir.
>
> Q. So you were contacted by two law enforcement officers within a matter of about 20 or 25 minutes, and you never breathed a word of what happened at the Hartman residence, is that correct?
>
> A. No sir, I just said that it was a mistake.

Referring to Brecht's silence while being held by the Winona police, the prosecutor asked:

> Q. At that time you told him what had happened, is that right?
>
> A. No, I did not tell him.
>
> ....
>
> Q. Did you ever tell any law enforcement officer that evening what had happened?
>
> A. I just said it was a mistake, I wanted to talk to somebody is what I said.
>
> Q. The place was crawling with cops wasn't it, at the Law Enforcement Center at Winona?
>
> A. There were a few officers there, yes.
>
> Q. You could have told any one of the officers what had happened.
>
> A. Yes, I could have sir.
>
> Q. But you didn't did you?
>
> A. I did not.
>
> Q. In fact the first time you have ever told this story is when you testified here today was it not?
>
> ....
>
> A. You mean the story of actually what happened?
>
> Q. Yes.
>
> A. I knew what happened, I'm just telling it the way it happened, yes, I didn't have a chance to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir.

Again, on its recross-examination of Brecht, the prosecutor questioned:

> Q. Did you tell anyone about what had happened in Alma?
>
> A. No. I did not.

Hurd, 135 Wis.2d 266, n. 5, 400 N.W.2d 42, n. 5. (App.Ct.1986).

Q. Again, with regard to Officer Papke, you told him that you wanted to talk to somebody, ... but you didn't tell Officer Papke what happened?

A. No, I did not....

In its closing argument, the state urged the jury to "remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence ... he made no statements to the law enforcement officers ... [h]e sits back here and sees all of our evidence go in and then he comes out with this crazy story...." In its closing argument on rebuttal, the state asserted, "I know what I'd say, I'd say 'hold on, this was a mistake, this was an accident, let me tell you what happened' but he didn't say that did he. No, he waited until he hears our story."

Brecht argues that the state's comments on his post-arrest silence violated his constitutional right to due process of law and against self-incrimination guaranteed under the fifth and fourteenth amendments to the United States Constitution and art. I, sec. 8, of the Wisconsin Constitution. Each stage of Brecht's silence must therefore be analyzed in a constitutional light.

PRE-ARREST, PRE-MIRANDA SILENCE

[1] As a starting point, we note that because no governmental action was involved, comments on Brecht's pre-arrest, pre-*Miranda* silence were permissible. *Jenkins v. Anderson*, 447 U.S. 231, 239–40, 100 S.Ct. 2124, 2129–30, 65 L.Ed.2d 86 (1980). Thus, the state could properly question Brecht, and comment to the jury, on his failure to aid Hartman or summon medical assistance, and his flight from the scene.

POST-ARREST, PRE-MIRANDA SILENCE

In *Fletcher v. Weir*, 455 U.S. 603, 606–07, 102 S.Ct. 1309, 1311–12, 71 L.Ed.2d 490 (1982), the United States Supreme Court held that the states may adopt their own rules as to whether it is permissible to comment on a defendant's post-arrest, pre-*Miranda* silence. The Court reasoned that this inquiry did not violate due process because the defendant's silence was not induced by *Miranda* warnings informing him of his right to remain silent and implicitly assuring him that his silence would not be used against him. *Id.*

This reasoning seems predicated upon the dubious proposition that a defendant only invokes his right to remain silent after he is formally advised of this right. In a modern society with mass communications publicizing a defendant's constitutional right to remain silent, it is at least an arguable assumption that by remaining silent a defendant is relying upon his constitutional right to do so, even though he has not been formally advised of it. Regardless, this issue may be determined by each state under its own laws and constitution.

Our supreme court has indicated that comments on a defendant's post-arrest, pre-*Miranda* silence are impermissible. *See State v. Fencl*, 109 Wis.2d 224, 236–37, 325 N.W.2d 703, 710–11 (1982). *Reichoff v. State*, 76 Wis.2d 375, 378–80, 251 N.W.2d 470, 472–73 (1977). Because this holding rests upon a defendant's privilege against self-incrimination as guaranteed under the fifth amendment and art. I, sec. 8, of the Wisconsin Constitution, it is unaffected by the due process analysis employed in *Fletcher*. Any change from this position must properly emanate from our supreme court. *State v. Grawien*, 123 Wis.2d 428, 432, 367 N.W.2d 816, 818 (Ct.App.1985).

[2] On cross-examination, the state repeatedly questioned Brecht on his silence following his arrest and detention by the Winona authorities. The state not only commented on Brecht's silence, but vigorously argued that this silence was evidence that Brecht fabricated the accidental shooting story after the state had introduced all of its evidence. These comments on Brecht's post-arrest, pre-*Miranda* silence were impermissible. *See Fencl*, 109 Wis.2d at 236–37, 325 N.W.2d at 710–11.

[3] The state attempts to justify its comments on Brecht's silence by claiming that he opened the door to such inquiry by testifying that he wanted to talk to some-

one about what happened and that "it was a mistake." It is true that a defendant's own testimony may permit the prosecutor to question him about his silence. *United States v. Shaw*, 701 F.2d 367, 384 (5th Cir.1983), *cert. denied*, 465 U.S. 1067, 104 S.Ct. 1419, 79 L.Ed.2d 744 (1984). Brecht's statements, however, were made in response to the state's repeated questioning as to why he had never told any law-enforcement officer that the shooting was accidental. In the face of such questions, it cannot be said that Brecht's responses permitted further inquiry, but, rather, that Brecht's statements were solely the result of improper questioning on his silence.

Because we conclude that the state's comments on Brecht's post-arrest, pre-*Miranda* silence were constitutional error, we must next determine whether that error was harmless beyond a reasonable doubt. *Fencl*, 109 Wis.2d at 238, 325 N.W.2d at 711. A court may find a constitutional error harmless if there is no reasonable possibility that the error contributed to the conviction. *Id.* In making this determination, a court applies a three-pronged test that examines the frequency of the error, the nature of the state's evidence, and the nature of the defense. *Id.*

[4] The frequency of the error involves not just a numerical computation but an examination of the comments within the context of the entire trial. The state asserts that the error was not prejudicial because, although the trial transcript totaled more than 900 pages, there were "only" three brief references in closing argument and inquiry during cross- and recross-examination of less than three pages. The question of prejudice, however, is not so easily answered.

The state's reference to Brecht's silence in both cross- and recross-examination went far beyond a simple inquiry as to his silence but involved a detailed recitation as to the various opportunities he had to explain the accident to a number of officers. This questioning led Brecht to testify that he wished to explain what had happened and the state's further exploration as to why he did not explain. Based upon the nature and length of the state's comments on Brecht's silence, and the vigorous nature in which his silence was argued as proof of his fabrication of an accidental shooting, we conclude that, under the frequency test, prejudice existed.

The second inquiry involves the nature of the state's evidence against Brecht. The state presented overwhelming and uncontradicted evidence that Brecht shot Hartman and caused his death. The disputed and ultimate issue was Brecht's intent at the time of the shooting. On this issue, the state relied entirely on circumstantial evidence. Accordingly, the state's comments on Brecht's failure to inform the authorities that the shooting was accidental was highly prejudicial and may have unduly influenced the jury.

The final test for harmless error concerns the nature of the defense. Brecht contended that the shooting was accidental. His testimony regarding the circumstances of the shooting and his intentions at that time raised the issue of his credibility to a critical level. The state's argument that Brecht's silence was inconsistent with his testimony, and its use of his silence as an attack on his credibility, also contributes to the danger that Brecht was prejudiced by this error.

POST-ARREST, POST-MIRANDA SILENCE

Whatever latitude the state may have in regard to commenting on a defendant's post-arrest, pre-*Miranda* silence, no such latitude exists in regard to silence following arrest and *Miranda* warnings. Such silence is constitutionally protected, and any comment thereon violates a defendant's due process right to a fair trial. *Wainwright v. Greenfield*, 474 U.S. 284, 106 S.Ct. 634, 638–39, 88 L.Ed.2d 623 (1986).

[5] It is unclear from the record whether Brecht was informed of his *Miranda* rights when first taken into custody. The record does demonstrate, however, that Brecht was informed of these rights at his initial court appearance. The state's asser-

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tions in closing arguments that Brecht first volunteered his accidental shooting story after the state had presented its evidence were comments on Brecht's post-*Miranda* silence. Those comments violated Brecht's right to due process of law. *See Wainwright*, 106 S.Ct. at 638–39.

[6] The prosecutor's comments on Brecht's post-arrest, post-*Miranda* silence were also prejudicial. Although the comments were infrequent, Brecht's credibility was undermined by the prosecutor's suggestion that his continued silence was proof that he had fabricated the accidental shooting story after hearing the state's evidence against him. In a first-degree murder prosecution in which intent is established solely by circumstantial evidence and the defendant's credibility is a critical issue, impermissible comments that attack credibility heighten the danger of prejudice. *See Reichoff*, 76 Wis.2d at 381–82, 251 N.W.2d at 473–74. Because the defense relied heavily upon Brecht's credibility and because the prosecutor's comments were clearly improper, we conclude that the comments on Brecht's post-arrest, post-*Miranda* silence were prejudicial.

In summary, we conclude that the state's comments on Brecht's silence constituted prejudicial error. We therefore conclude that Brecht's conviction must be reversed.

Brecht contends that his conviction should be reversed on several other grounds. Because addressing these issues may be helpful on any retrial, we will examine these contentions.

Brecht argues that the trial court erred by admitting evidence of his homosexuality. The admission of this evidence was predicated upon Hartman's disapproval of Brecht's lifestyle and his communication of this feeling to Brecht. An argument between the two concerning Hartman's attitude would provide Brecht with a possible motive to shoot Hartman. The state expected Hartman's wife, Molly, to testify that Hartman had informed Brecht of his feelings concerning Brecht's lifestyle. During the trial, however, Molly specifically denied that Hartman had ever communicated his disapproval of Brecht's homosexuality to Brecht.

We recognize that a trial court has broad discretion in determining the relevancy and admissibility of proffered evidence. *State v. Pharr*, 115 Wis.2d 334, 342–45, 340 N.W.2d 498, 501–03 (1983). A trial court's determination of relevancy will be upheld unless it constitutes an abuse of discretion. *Id.* at 342, 340 N.W.2d at 501. A reviewing court will not find an abuse of discretion if there is a reasonable basis for the trial court's determination. *Id.*

Although evidence of motive is not an element of the crime charged, it is admissible if it meets the relevancy standards of sec. 904.01, Stats.[2] *State v. Phillips*, 99 Wis.2d 46, 54, 298 N.W.2d 239, 243 (Ct.App. 1980). This statute has been interpreted to mean that any fact that tends to prove a material issue is relevant. *Pharr*, 115 Wis.2d at 344, 340 N.W.2d at 502.

[7] Here, evidence of Brecht's homosexuality was irrelevant. Although it is true that one of the conditions of Brecht's remaining in the Hartman home was that he not engage in homosexual conduct, the imposition of such a rule approximately one week prior to the shooting fails to establish a motive for murder. If the evidence had established a connection between Brecht's lifestyle and motive, admitting evidence of Brecht's homosexuality may have been justified. In the absence of such evidence, evidence of Brecht's homosexuality was not probative of motive or any other material issue underlying the crime charged. Irrelevant evidence should not be admitted. Section 904.02, Stats. Accordingly, we conclude that the trial court erred by admitting this evidence.

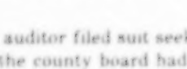
[8] Brecht also contends that the trial court erroneously determined that the state could introduce evidence of his prior worthless check convictions should he open the door to this evidence. During the trial, Brecht advised the court that he intended to call his probation officer, Mrs. Rusch, to testify as to her opinion of his nonassaul-

2. Section 904.01 defines relevant evidence as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

tive, nondangerous character. A defendant may introduce character evidence of nonviolence. *King v. State*, 75 Wis.2d 26, 38–39, 248 N.W.2d 458, 464–65 (1977); sec. 904.04(1)(a), Stats. The court ruled that should such evidence be introduced, it would permit the state to cross-examine Rusch concerning Brecht's worthless check convictions.

A cross-examination of Rusch concerning Brecht's worthless check convictions is totally unrelated to the question of a character trait of nonviolence. The court therefore erred by declaring that Rusch's testimony would open the door to a detailed recitation of Brecht's prior convictions. *See* sec. 904.05(1), Stats.

Judgment reversed.



138 Wis.2d 172

Robert M. HARBICK, Plaintiff-Appellant,

v.

MARINETTE COUNTY and Theodore J. Sauve, Harold Kinziger, Wilbur Leslie, Raymond Mattison, Everett Krull, Ralph J. Orlando, Donald A. Witt, Fred Forst, Lawrence A. Theisen, Robert H. Murrock, Claryce M. Maedke, Adolph Staidl, Kenneth H. Nischke, Gene F. Gusy, John H. Harper, Edward Kowalski, Darrell W. Dumke, William R. Setunsky, William G. Walker, Ronald Baumgarten, Carole A. Faucett, Walter J. Stepniak, Edward F. Poquette, James Tebo, Robert Dulak, David Setunsky, William Gill, Don Clewley, William Allen and Kenneth Powell, Defendants-Respondents.

No. 86-1712.*

Court of Appeals of Wisconsin.

Submission on Briefs March 2, 1987.

Opinion Released March 17, 1987.

Opinion Filed March 17, 1987.

County auditor filed suit seeking declaration that the county board had unlawfully transferred account-keeping duties from the clerk's office to the county auditor. The Circuit Court, Marinette County, Richard G. Greenwood, J., declared the transfer lawful. The clerk appealed. The Court of Appeals, Myse, J., held that the county's transfer of account-keeping duties from the clerk to the auditor was lawful.

Affirmed.

1. Counties ⇐89

Statute providing that county clerk is to keep all accounts of county and all books of account as county board directs is ambiguous and, thus, could be interpreted to mean that clerk is to keep only those accounts and books of account designated by board. W.S.A. 59.17(8).

2. Counties ⇐21½

Permitting county board to determine which official will perform county's account-keeping duties comports with legislature's intent in giving counties largest measure of self government in accordance with spirit of administrative home rule. W.S.A. 59.025, 59.026, 59.07, 59.17(8), 59.72.

3. Counties ⇐91

In enacting statute delineating powers and duties of county auditors, legislature sought to enable counties to employ professionals with special expertise as auditors to handle county's complex fiscal matters and, in so doing, legislature specifically provided that those account-keeping duties necessary to auditor's function could be transferred from county clerk to auditor. W.S.A. 59.72.

4. Counties ⇐91

To deprive counties of opportunity to bring professional expertise to bear on complex fiscal matters faced by county government would unduly hamper their ability to effectively fulfill their governmental functions and, therefore, county could transfer account keeping duties from county clerk to auditor. W.S.A. 59.17(8), 59.72.

* Petition for Review Pending.

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into a conditional right. Thus, the right not to have silence used at trial exists on the condition that the individual asserting the right does not testify. This consequence of the majority's rule is made even more egregious by the fact that the condition is unstated and, therefore, known only to the most sophisticated. Most persons when arrested or questioned by the police prior to arrest, will not have the benefit of counsel and, consequently, will be ignorant of the effect of their silence on a subsequent decision to testify at trial. As stated by the dissent in the United States Supreme Court decision of *Jenkins*,

"This means that a person who thinks he may have done something wrong must immediately decide, most likely without the assistance of counsel, whether, if he is ever charged with an offense and brought to trial, he may wish to take the stand. For if he may later want to take the stand, he had better go to the police station right away to preserve his exculpatory explanation of the events—even though in so doing he must incriminate himself and provide evidence which may be crucial to his eventual conviction. But if he decides not to incriminate himself, he may anticipate that his right to testify in his own defense will be undermined by the argument that his story is probably untrue because he did not volunteer it to the police at the earliest opportunity." *Jenkins*, 447 U.S. at 253, 100 S.Ct. at 2137 (Marshall, J., dissenting).

For the foregoing reasons, I conclude that the majority errs in holding that references to a testifying defendant's pre-*Miranda* silence do not violate the privilege against compelled self-incrimination under Art. I, Sec. 8 of the Wisconsin Constitution. A defendant's pre-*Miranda* silence at arrest or during police questioning prior to arrest, should be constitutionally protected to the same degree as a defendant's post-*Miranda* silence when the defendant elects to take the stand. Accordingly, I conclude that any reference to a testifying defendant's silence at arrest or during police questioning prior to arrest, and prior to receipt of *Miranda* warnings, is constitutional error. In the present case, however, there is no reasonable possibility that the error contributed to Sorenson's conviction; the references to Sorenson's pre-*Miranda* silence were infrequent, and the strength of the state's evidence against him was substantial. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

I am authorized to state that Chief Justice NATHAN HEFFERNAN joins in this concurrence.

143 Wis.2d 297

STATE of Wisconsin,
Plaintiff-Respondent-Petitioner,

v.

Todd A. BRECHT, Defendant-Appellant.

No. 86-1317-CR.

Supreme Court of Wisconsin.

Argued Dec. 2, 1987.

Decided March 23, 1988.

Defendant was convicted in the Circuit Court, Buffalo County, Peter G. Pappas, J., of first-degree murder with use of dangerous weapon, and he appealed. The Court of Appeals, Myse, J., 138 Wis.2d 158, 405 N.W.2d 718, reversed. State sought review. The Supreme Court, Bablitch, J., held that: (1) reference to defendant's pre-arrest, pre-*Miranda* silence at time he was not being questioned by police did not implicate defendant's right to remain silent; (2) erroneous reference to post-*Miranda* silence was harmless error; (3) evidence of defendant's homosexuality was admissible; and (4) error in ruling that State could cross-examine defendant's probation officer concerning defendant's worthless check conviction if defendant called officer to testify about defendant's nonviolent character was harmless.

Decision of Court of Appeals reversed.

1. Criminal Law ⇐721(4)

Reference to defendant's prearrest, pre-*Miranda* silence at time defendant was not being questioned by police did not implicate defendant's right to remain silent. W.S.A. Const. Art. 1, § 8; U.S.C.A. Const. Amend. 5.

2. Witnesses ⇐297(1)

Absent circumstances that might compel reasonable person to speak and incriminate himself or herself, privilege against compelled self-incrimination does not arise. W.S.A. Const. Art. 1, § 8; U.S.C.A. Const. Amend. 5.

3. Criminal Law ⇐396(1)

Testimony concerning defendant's pre-*Miranda* silence was admissible, where defendant had opened door to such inquiry when defense counsel cross-examined police officer and raised, for first time, defendant's statements that it was "big mistake" and that defendant "wanted to talk to someone." W.S.A. Const. Art. 1, § 8; U.S.C.A. Const.Amend. 5.

4. Criminal Law ⇐706(4), 721(4)

Repeated reference to defendant's pre-*Miranda* silence during cross-examination and closing argument did not violate defendant's right to remain silent once defendant elected to testify. W.S.A. Const. Art. 1, § 8; U.S.C.A. Const.Amend. 5.

5. Criminal Law ⇐720(1)

State's assertions that defendant did not volunteer his explanation of accidental nature of shooting until State presented its evidence at trial were comments on defendant's post-*Miranda* silence and as such were constitutional error. W.S.A. Const. Art. 1, § 8; U.S.C.A. Const.Amend. 5.

6. Criminal Law ⇐1171.3

Error in commenting upon defendant's post-*Miranda* silence was harmless beyond reasonable doubt given infrequency of references in context of entire trial and strength of State's evidence against defendant. U.S.C.A. Const.Amend. 5; W.S.A. Const. Art. 1, § 8.

7. Criminal Law ⇐1165(1)

Relevant factors considered when determining harmless error include frequency of error, nature of State's evidence, and nature of defense.

8. Homicide ⇐166(2)

Evidence of defendant's homosexuality was admissible in prosecution of defendant for murder of his brother-in-law to suggest possible motive for shooting of brother-in-law, who disapproved of defendant's homosexuality.

9. Witnesses ⇐274(2)

Proffered testimony of defendant's probation officer about defendant's nonassaultive, nonviolent character did not "open the door" to State's proposed cross-examination of agent on defendant's worthless check convictions. W.S.A. 904.04(1)(a).

10. Criminal Law ⇐1170½(1)

Trial court error in ruling that State could cross-examine defendant's probation officer on defendant's worthless check conviction if defendant called officer to testify about defendant's nonviolent character was not reversible error, where State's evidence against defendant was strong.

Jeffrey M. Gabrysiak, Asst. Atty. Gen., argued for plaintiff-respondent-petitioner; Donald J. Hanaway, Atty. Gen., on brief.

Janet A. Jenkins, La Crosse, argued for defendant-appellant; Arneson & Jenkins, S.C., La Crosse, on brief.

BABLITCH, Justice.

The State of Wisconsin (State) seeks review of a court of appeals' decision, *State v. Brecht*, 138 Wis.2d 158, 405 N.W.2d 718 (1987), that reversed the judgment of conviction for first degree murder entered against Todd A. Brecht (Brecht) by the circuit court for Buffalo county, Judge Peter G. Pappas. The court of appeals based its reversal on the grounds that references to Brecht's pre-trial silence during cross-examination and during the State's closing

argument impermissibly infringed on Brecht's constitutional rights to silence and to a fair trial, and that such errors were prejudicial.

While we agree that some of the State's references to Brecht's silence were constitutional error, we hold that such error was harmless. In considering the other issues raised on appeal, we conclude that the circuit court properly exercised its discretion in admitting evidence of Brecht's homosexuality because such evidence may have been relevant to the issue of motive. However, the circuit court erred in ruling that the State could cross-examine Brecht's character witness about Brecht's prior convictions. Nonetheless, we conclude that Brecht was not prejudiced by this error. Accordingly, we reverse the decision of the court of appeals.

On October 17, 1985, Brecht shot and wounded his brother-in-law, Roger Hartman (Hartman), who was the district attorney for Buffalo county, Wisconsin. Hartman died several weeks later. Brecht was arrested on the day of the shooting and subsequently tried by jury. He argued at trial that the shooting was accidental. The jury, however, found him guilty of the first degree murder of Hartman. The following facts are relevant to this appeal.

On October 12, 1985, Molly and Roger Hartman went to the Georgia State prison to secure the release of Molly Hartman's younger brother, Brecht. At that time, Brecht was imprisoned after conviction for a felony theft of $3,750. His release from prison and placement on probation were conditioned on payment of $3,750 in restitution for his theft. The Hartmans paid his restitution and obtained his release and the transfer of his probation to Wisconsin. The conditions of Brecht's probation, as stated in defense counsel's brief, consisted of the following: "1) not violating the law of any government; 2) avoiding injurious and vicious habits—especially alcoholic intoxication, and; 3) not leaving the State without permission."

The Hartmans brought Brecht to their home in Alma, Wisconsin, where he was to stay until an opening in an Eau Claire halfway house became available. The Hartmans told Brecht that while he lived in their home he was to refrain from homosexual activity in the Alma area and from drinking.

Brecht testified that on the day of the shooting he had been drinking and playing with a gun that belonged to Roger Hartman while the latter was at work and Molly Hartman was out shopping. Brecht had been using the gun to shoot at tin cans in the Hartman's yard. After firing the gun, Brecht testified that he saw Roger Hartman pull into the driveway. Because Brecht did not want Hartman to see him with the gun, he ran into the rear garage and entered a downstairs hallway. Brecht explained that he intended to replace the gun in the upstairs room where he had found it.

With the gun in hand, Brecht stopped to listen for Hartman. Hearing nothing, Brecht testified that he started running for the stairs to the upper level when he tripped and the gun discharged. A bullet struck Hartman in the back.

Brecht yelled to Hartman and looked for him but Hartman had disappeared. Brecht then took Molly Hartman's car and drove around the area searching for Hartman. Upon spotting Hartman at the door of a neighbor's house, Brecht drove off in the car. The Hartman car was observed traveling at a faster than normal speed away from Alma and towards Fountain City.

Neighbors of the Hartmans testified that Roger Hartman had come to their house, seeking help and told them that Brecht had shot him. Police officers who had surveyed the Hartman residence after the shooting, testified that they had found beer cans in the house, and a liquor bottle and a soda can with a bullet hole in it and spent .22 casing in the backyard. Experts from the State Crime Laboratory testified that Brecht's fingerprints were on an ammunition box and on a brandy bottle found in the Hartman home. Additionally, it was noted that the doorway area leading into the hallway from the garage was covered with tightly stretched carpet and that nothing was observed on which one could trip.

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Meanwhile, Brecht had driven the Hartman car into a ditch near Fountain City, rendering the car inoperable. Officer Zeller arrived and offered Brecht assistance with the car, but Brecht told Zeller that his sister would call a wrecker for him. Brecht subsequently obtained a ride from a stranger, Melvin Schlesselman, to the nearest town, Winona, Minnesota. He did not mention the shooting incident to either Schlesselman or Zeller.

In Minnesota, Brecht was stopped by the Winona police in a shopping center. He falsely identified himself and when his true identity was ascertained, he was arrested by the police for the shooting of Hartman in Wisconsin. Brecht told officer Papke, one of the arresting officers, that it was a mistake and that he wanted to talk with "somebody that would understand [him]." However, neither Brecht's testimony nor that of the police officers' indicate that Brecht explained the shooting incident upon arrest.

The record is unclear when Brecht received his *Miranda* warnings. The State submitted testimony by two of the five officers involved in the arrest, who testified that Brecht was not given his *Miranda* warnings in their presence. However, the record does reflect that Brecht did receive his *Miranda* warnings at his initial appearance.

On November 11, 1985, Hartman died. A coroner testified that the bullet wound was a substantial factor in producing his death. He also testified that the bullet which entered Hartman's back and exited his chest, traveled on a basically horizontal to slightly downward trajectory.

At trial, the State questioned Zeller, Schlesselman and Papke during its case-in-chief about Brecht's failure to mention Hartman's condition and the accidental nature of the shooting. Additionally, the State attempted to directly impeach Brecht's credibility by cross-examining Brecht on his pre-trial silence concerning the shooting and by making reference to his silence during closing argument.

The State also sought to introduce evidence of Brecht's homosexuality to establish a possible motive for the shooting. The circuit court permitted the introduction of such evidence, over Brecht's objection, noting its relevancy to the issue of motive. During trial, the State produced letters Brecht had written to an inmate in the Georgia prison where Brecht had been incarcerated. The State alleges that one of the letters contained homosexual overtones, a fact Brecht disputes. Additionally, the State elicited testimony from Molly Hartman on Brecht's homosexuality. Molly Hartman testified at trial that her husband had disapproved of Brecht's homosexuality. However, she gave conflictng testimony as to whether her husband had communicated this disapproval directly to Brecht.

Brecht sought to call his probation officer to testify about Brecht's non-violent character. The circuit court ruled that the introduction of such evidence would also permit the State to cross-examine the officer about Brecht's conviction for writing worthless checks. Consequently, Brecht chose not to call his probation officer and rested his case.

Additionally, both parties stipulated to the filing of ex parte briefs to the court. These briefs were subsequently filed in open court.

The jury found Brecht guilty of first degree murder by use of a dangerous weapon. He was sentenced to life in prison with penalty enhancement for use of a dangerous weapon and for being a repeat offender. Brecht appealed the judgment of conviction.

The court of appeals reversed the conviction on the grounds that the State's references to Brecht's silence impermissibly infringed Brecht's right to silence and to a fair trial, and that such references were prejudicial. The court further concluded that the circuit court erred in admitting evidence of Brecht's homosexuality and in ruling that the State could cross-examine the probation officer on Brecht's worthless checks conviction.

The State subsequently filed a petition to review with this court, seeking reversal of

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the court of appeals' decision. The petition was granted on July 29, 1987.

The central question presented on review is whether Brecht's constitutional rights to silence [1] and to a fair trial were violated by the State's references to his silence. The references at issue include: 1) elicitation of evidence on Brecht's pre-*Miranda* silence during the State's case-in-chief, 2) references to Brecht's pre-*Miranda* silence after Brecht elected to testify, and 3) comments on Brecht's post-*Miranda* silence during the State's cross-examination of Brecht and closing argument. If such references were constitutional error, we must also determine whether the error was harmless beyond a reasonable doubt. Brecht asserts that references to his silence in all three contexts were constitutional error and prejudicial.

We first consider Brecht's claim that the elicitation of evidence on his silence during the State's case-in-chief violated his right to silence secured under Art. I, Sec. 8 of the Wisconsin Constitution and the Fifth Amendment of the United States Constitution. The references challenged by Brecht consist of testimony elicited from three State witnesses, officer Zeller, Melvin Schlesselman, and officer Papke, during the State's case-in-chief.[2] Because the record does not reflect that Brecht received his *Miranda* warnings until his initial appearance, we treat this testimony as references to Brecht's pre-*Miranda* silence.

The first reference to Brecht's silence was elicited from officer Zeller, the officer who spoke with Brecht when his car was in the ditch.

"Q. Did you speak with this person [Brecht]?
"A. Yes.
"Q. What did you say?
"A. I asked him for his name, and I also asked him if he needed a wrecker, and where he was from.
"Q. What did he respond?
"A. He stated his name was Todd Brecht, and he stated that he was from Alma. In reference to the wrecker he said, 'My sister will get a wrecker from Alma.'
"Q. Did he say anything else?
"A. No."

Brecht asserts that the State made a similar inquiry into his silence on direct examination of Melvin Schlesselman, the individual who gave Brecht a ride to Winona, Minnesota. Schlesselman testified on direct examination by the State:

"Q. At any time during that period of time did he ever ask you to call and (sic) ambulance for anyone?
"A. No sir.
"Q. Did he ever ask you to call the police for him?
"A. No sir.
"Q. Did he ever mention a Roger Hartman to you?
"A. No sir."

Lastly, Brecht objects to the testimony elicited during the State's examination of officer Papke on redirect. Papke was one of the officers who apprehended Brecht in Winona for the shooting.

"Q. Officer Papke did you or anyone else in your presence advise the defendant of his constitutional rights?
"A. No.
"Q. Now you stated he said it was a big mistake—did he say what was a big mistake?
"A. No he didn't.
"Q. Did he offer any explanation about anything whatever?
"A. No.

1. Although Art. I, Sec. 8 of the Wisconsin Constitution and the Fifth Amendment of the United States Constitution do not expressly include the phrase "right to silence," that phrase has become a shorthand for describing the rights encompassed within the privilege against compelled self-incrimination and is used in that sense throughout this opinion.

2. Brecht also objects to the following testimony elicited from deputy Bratner during the State's case-in-chief:

"Q. Did you arrest the defendant?
"A. I served the arrest warrant on him, yes.
"Q. Did you give him Miranda warning?
"A. No."

We conclude that this testimony does not constitute a reference to Brecht's silence and, therefore, do not consider it in our analysis.

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"Q. Was he advised as to why he was being taken into custody?
"A. Yes he was.
"Q. Again you stated what?
"A. I told him he was sought by Buffalo County authorities for a shooting incident in Wisconsin.
"Q. Did he explain anything about a shooting incident to you?
"A. No he didn't.
"Q. To anyone else in your presence?
"A. Not to my knowledge, no."

To ascertain whether these references violated Brecht's constitutional right to silence, we must examine the nature of the right and when it attaches. The proscription against use of a defendant's silence is derived from the privilege against self-incrimination found in Art. I, Sec. 8 of the Wisconsin Constitution. *See Rudolph v. State*, 78 Wis.2d 435, 442, 254 N.W.2d 471 (1977) (per curiam), citing, *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). This privilege, also guaranteed under the Fifth Amendment of the United States Constitution, provides that "[n]o person may be ... compelled in any criminal case to be a witness against himself or herself." Wisconsin Const. Art. I, Sec. 8. The United States Supreme Court has broadly construed the fifth amendment privilege to prohibit compelled self-incrimination not only in criminal proceedings but "in all settings in which ... freedom of action is curtailed in any significant way...." *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed. 2d 694 (1966).

As a corollary to the fifth amendment privilege, the Supreme Court has recognized an individual's right to remain silent and not have the exercise of his or her fifth amendment privilege used by the prosecution at trial. In *Miranda*, the Court noted that the prosecution may not use at trial the fact that a defendant stood mute or claimed his privilege in the face of accusation. *Miranda*, 384 U.S. at 486 n. 37, 86 S.Ct. at 1624 n. 37. Similarly, in *Griffin*, the Supreme Court held it was constitutional error for the prosecution to use a non-testifying defendant's silence against him at trial. *Griffin*, 380 U.S. 609, 85 S.Ct. at 1229. To allow otherwise, the Court reasoned, would penalize the defendant for the exercise of his privilege and erode its protections by making the assertion of the privilege costly. *Id.* at 614, 85 S.Ct. at 1232.

Consistent with this precedent, this court has held that it is a violation of the right to remain silent for the State to present testimony in its case-in-chief on the defendant's election to remain silent during a custodial investigation, after arrest. *Rudolph*, 78 Wis.2d at 442, 254 N.W.2d 471. Further, in *Reichhoff v. State*, 76 Wis.2d 375, 251 N.W.2d 470 (1977), we acknowledged that the right to silence attaches at the time of a defendant's arrest, even though no police interrogation or questioning occurs. *Id.* In that case, we held that it was constitutional error for the State to elicit testimony during its case-in-chief on the defendant's silence upon arrest. Such testimony included statements from an arresting officer that the defendant, "just put his wrists out ... for the handcuffs and never said a word." *Id.* at 377 n. 1, 251 N.W.2d 470.

More recently, in *State v. Fencl*, 109 Wis.2d 224, 325 N.W.2d 703 (1982), we recognized that the right to silence also attaches when an individual is being questioned by the police, prior to arrest and receipt of *Miranda* warnings. *Id.* In *Fencl*, the State had violated the defendant's constitutional rights by referring to the defendant's pre-arrest, pre-*Miranda* silence in its case-in-chief. As we stated,

"Any time an individual is questioned by the police, that individual is compelled to do one of two things—either speak or remain silent. If both a person's prearrest speech and silence may be used against that person, as the state suggests, that person has no choice that will prevent self-incrimination. This is a veritable 'Catch-22.' ... We hold that a person is entitled to the protection of the Fifth Amendment even prior to arrest or a custodial interrogation." *Id.* at 237, 325 N.W.2d 703.

[1] Brecht asserts that *Fencl* dictates that all reference to pre-*Miranda* silence violates the protections of the privilege against compelled self-incrimination. Therefore, he maintains that the State's elicitation of testimony on his pre-*Miranda* silence from Schlesselman and Zeller was constitutional error. However, the defendant's silence in *Fencl* occurred prior to his arrest and receipt of *Miranda* warnings, and at a time when the defendant was being questioned by police during a murder investigation. To conclude that Brecht's silence during his encounters with both men was constitutionally protected would extend the right to silence to circumstances beyond those presented in *Fencl*. We decline to so hold.

[2] Rather, we conclude that Brecht's right to silence was not implicated in his encounters with Schlesselman and Zeller. A reasonable person in Brecht's position would not conclude that either of these meetings was coercive or in any way curtailed Brecht's freedom of action. *See State v. Koput*, 142 Wis.2d 370, 378, 418 N.W.2d 804, 808, citing *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (employing an objective test to assess whether a suspect is "in custody" for purposes of receipt of *Miranda* warnings). Schlesselman was an ordinary citizen, not a governmental officer. There was nothing coercive about Brecht's exchange with Schlesselman. Similarly, officer Zeller's brief inquiry and offer of assistance to Brecht was not coercive nor restrictive of Brecht's freedom. We emphasize that the right to silence is derived from the privilege against *compelled* self-incrimination. Absent circumstances such as those present in *Fencl*, that might compel a reasonable person to speak and incriminate himself or herself, the privilege against compelled self-incrimination does not arise. Thus, the testimony elicited from Schlesselman and Zeller during the State's case-in-chief did not violate Brecht's rights under Art. I, Sec. 8 of the Wisconsin Constitution and the Fifth amendment of the United States Constitution.[3]

[3] We further conclude that it was not constitutional error for the State to elicit officer Papke's testimony on Brecht's pre-*Miranda* silence during redirect. Brecht had "opened the door" to such inquiry into his silence when Brecht's counsel cross-examined Papke and raised, for the first time, Brecht's statements that it was a "big mistake" and that Brecht "wanted to talk to someone." Specifically, the following cross-examination occurred,

"Q. After you had taken him into custody he made a statement to you as you approached the squad car didn't he?

"A. Yes.

"Q. In fact he told you that it was a big mistake, he wanted to talk to someone.

"A. Yes he did.

"Q. He never explained further to you what he meant by 'big mistake', did he?

"A. No he didn't."

Because Brecht's counsel initially raised the issue of Brecht's silence when under arrest, the State was free to subsequently elicit Papke's testimony on Brecht's silence during arrest on redirect. *Accord United States v. Robinson*, — U.S. —, 108 S.Ct. 864, 99 L.Ed.2d 23 (no violation of the fifth amendment for a prosecutor to refer to defendant's failure to testify where such remark is a "fair response to a claim made by the defendant or his counsel"); *United States v. Shaw*, 701 F.2d 367, 384 (5th Cir.1983).

3. Brecht also argues that this testimony should have been excluded as irrelevant. We disagree. Brecht's silence about the shooting during his encounters with Schlesselman and Zeller is relevant to the issue of his credibility and the State's theory that if Brecht had accidentally shot Hartman he would have sought help. In contrast to an individual's silence in the face of governmental coercion, where the right to silence is implicated, Brecht's silence under the circumstances presented here is not "insolubly ambiguous." *See Reichhoff*, 76 Wis.2d at 382, 251 N.W.2d 470, (noting that a defendant's custodial silence is "insolubly ambiguous" because such silence may be attributable to the fact that the defendant is exercising his right to silence), citing *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

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[4] Brecht next contends that his right to silence was further infringed by repeated references to his pre-*Miranda* silence during cross-examination and closing argument by the State. However, based on our recent decision in *State v. Sorenson*, 143 Wis.2d 226, —, 421 N.W.2d 77, 90, we conclude that such references do not violate a defendant's right to silence under Art. I, Sec. 8 of the Wisconsin Constitution once the defendant elects to testify. In *Sorenson*, we held that a testifying defendant may be impeached with his pre-*Miranda* silence.[4] *See also Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) (in which the United States Supreme Court declared that the fifth amendment is not violated when a testifying defendant is impeached with his pre-arrest silence). Thus, once Brecht chose to testify, the State was free to refer to his failure to tell authorities about the accidental nature of the shooting without infringing upon his constitutional right to silence.

Finally we address Brecht's claim that the State's references to his post-*Miranda* silence during cross-examination and closing argument violated his right to a fair trial under the due process clause of the federal and state constitutions. Because the record does not show that Brecht received his *Miranda* warnings until the time of his initial appearance, we only consider those comments which encompass his silence after his initial appearance and prior to trial. The first challenged reference to Brecht's post-*Miranda* silence occurred during the State's cross-examination of Brecht,

"Q. In fact the first time you have ever told this story is when you testified here today was it not?

"....

"A. You mean the story of actually what happened?

"Q. Yes.

"A. I knew what happened, I'm just telling it the way it happened, yes, I didn't have a chance to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir."

The State inquired on re-cross examination,

"Q. Did you tell anyone about what had happened in Alma?

"A. No I did not."

Additionally, Brecht argues that the State's comments during closing argument were constitutional error,

"and remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence....

"....

"He sits back here and sees all of our evidence go in and then comes out with this crazy story....

"....

"I know what I'd say, I'd say, I'd say 'hold on, this was a mistake, this was an accident, let me tell you what happened,' but he didn't say that did he. No, he waited until he hears our story."

It is well established that it is fundamentally unfair and a violation of a defendant's constitutional right to due process to use a defendant's silence after receipt of *Miranda* warnings for impeachment purposes at trial. *Doyle*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (constitutional error to impeach a defendant with his post-arrest, post-*Miranda* silence); *Fencl*, 109 Wis.2d 224, 325 N.W.2d 703; *see also Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982) (per curiam) (where the Supreme Court limited its holding in *Doyle* by concluding that due process concerns do not prohibit impeachment with post-arrest, pre-*Miranda* silence), *accord Sorenson*, 143 Wis. at —, 421 N.W.2d at 89. The basis for this holding is twofold. First, because an arrestee's silence following *Miranda* warnings may be nothing more than his or her exercise of *Miranda* rights, post-*Miranda* silence is insolubly ambiguous. Second, and more important, it would be

4. While the author of this opinion disagreed with the majority's curtailment of the right to silence in *Sorenson*, *see* 143 Wis. at —, 421 N.W.2d at 93 (Bablitch J., concurring), and continues to adhere to that position, the resolution of this issue is controlled by the holding in *Sorenson*.

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fundamentally unfair to allow an arrestee's silence to be used to impeach an explanation subsequently offered at trial after he or she has been impliedly assured, by *Miranda* warnings, that silence will carry no penalty. *Doyle*, 426 U.S. at 617–18, 96 S.Ct. at 2244–45.

[5] Brecht's post-*Miranda* silence is, therefore, constitutionally protected at trial. The State's assertions that Brecht did not volunteer his explanation of the accidental nature of the shooting until the State presented its evidence at trial were comments on Brecht's post-*Miranda* silence and as such were constitutional error. We are unpersuaded by the State's attempts to characterize this improper use of Brecht's silence as merely a reference to "the defense tactic of not committing itself to a theory of defense prior to the presentation of the state's case."

[6, 7] Although it was constitutional error for the State to refer to Brecht's post-*Miranda* silence during cross-examination and closing argument, we conclude, contrary to the court of appeals, that this error does not require reversal. A constitutional error is considered harmless if the court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). This requires that the court find that there is no "reasonable possibility" that the error "contributed to the conviction." *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985); *Chapman*, 386 U.S. at 23, 87 S.Ct. at 827. The relevant factors considered when determining harmless error include: 1) the frequency of the error, 2) the nature of the State's evidence against the defendant, and 3) the nature of the defense. *Rudolph*, 78 Wis.2d at 443, 254 N.W. 471.

In the present case, the improper references to Brecht's silence were infrequent. The four references comprised less than two pages of a 900 page transcript, or a few minutes in a four day trial in which twenty-five witnesses testified. Although the court of appeals emphasized the "length" of the State's comments on Brecht's silence, *Brecht*, 138 Wis.2d at 167, 405 N.W.2d 718, the court was including as error references to Brecht's silence during cross-examination. Because such references were found permissible in *Sorenson*, we limit our evaluation to references to Brecht's post-*Miranda* silence. Although we recognize that such references to a defendant's silence have a high potential for prejudice, *Reichhoff*, 76 Wis.2d at 382, 251 N.W.2d 470, we conclude that in the present case the infrequency of the references in the context of the entire trial mitigated any possible prejudicial effect on the jury. *Accord Fencl*, 109 Wis.2d at 238–39, 325 N.W.2d 703 (six references to defendant's silence during a five day trial were harmless beyond a reasonable doubt).

The other factors to consider are the strength of the evidence against Brecht and the nature of Brecht's defense. It is undisputed that Brecht shot Hartman. Brecht testified at trial that the shooting was an accident. However, the State introduced strong circumstantial evidence that the shooting was intentional, including evidence of motive. Hartman told several persons that Brecht had shot him in the back. Brecht never secured help for Hartman, although he had ample opportunity to do so. Instead, Brecht fled the scene and, ultimately, the state. Additionally, the physical evidence contradicts Brecht's assertion that the shooting was accidental. The horizontal trajectory of the bullet into Hartman's back is inconsistent with Brecht's testimony that the gun accidentally discharged as he was falling. Officers who surveyed the Hartman house after the shooting did not observe anything in the downstairs hallway which would have caused Brecht to trip. As we have noted in previous cases, a finding of guilt may be based upon circumstantial evidence alone. *Rudolph*, 78 Wis.2d at 444, 254 N.W.2d 471.

In conclusion, given the infrequency of the references in the context of the entire trial and the strength of the State's evidence against Brecht, the State's references to Brecht's silence were harmless beyond a reasonable doubt.

[8] The second source of alleged error raised on appeal is whether the circuit court erred in permitting the State to make reference to and introduce evidence on Brecht's homosexuality. Prior to trial, Brecht had brought several motions to bar all references to his homosexuality on the grounds that such evidence was both irrelevant and prejudicial. The State sought to introduce evidence of Hartman's disapproval of Brecht's homosexuality as a motive for the shooting. In particular, the State sought to question Molly Hartman about her husband's disapproval of Brecht's homosexuality and his communication of this disapproval to Brecht.

The trial court acknowledged the prejudicial nature of such evidence but concluded that it should be admitted because it was relevant on the issue of motive. During trial, the court also permitted the State to introduce letters Brecht wrote to an inmate in the Georgia prison where Brecht had been incarcerated. One letter indicated that Brecht planned to raise $50,000 and obtain his friend's release. Brecht objected to the admission of the letter because of its homosexual overtones and the possibility of prejudice.

The court of appeals held that the circuit court erred in admitting evidence of Brecht's homosexuality. The court of appeals reasoned that such evidence was irrelevant because of the lack of connection between Brecht's sexual preference and motive. However, we conclude that there was sufficient evidence linking Brecht's lifestyle to a motive for the shooting such that the evidence of Brecht's homosexuality was relevant.

A circuit court has broad discretion in determining the relevance and admissibility of proffered evidence. *State v. Pharr*, 115 Wis.2d 334, 342–45, 340 N.W.2d 498 (1983). When reviewing a question on the admissibility of evidence, an appellate court must determine whether the court exercised its discretion in accordance with accepted legal standards and with the facts of record. *McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971). The test is not whether this court agrees with the ruling of the circuit court, but whether appropriate discretion was in fact exercised. *State v. Wollman*, 86 Wis.2d 459, 464, 273 N.W.2d 225 (1979).

Under sec. 904.02, Stats., relevant evidence is generally admissible. The criterion of relevancy is whether the evidence sought to be introduced has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01. This court has recognized that while motive is not an element of any crime it may nevertheless be a proper subject of inquiry and admissible if it meets the same standards of relevance as other evidence. *State v. Berby*, 81 Wis.2d 677, 686, 260 N.W.2d 798 (1978) ("Motive is an evidentiary circumstance which may be given as much weight as the fact finder deems it entitled to.").

In the present case, the circuit court found that the evidence referring to Brecht's homosexuality and Hartman's objections to Brecht's homosexuality did suggest a possible motive for the shooting and, therefore, made more probable the State's claim that Brecht had in fact murdered Hartman. The record reflects that Hartman disapproved of Brecht's homosexuality and that this disapproval was conveyed to Brecht by the restrictions Hartman and his wife imposed on Brecht while he lived in their home. These restrictions included that Brecht was to refrain from homosexual conduct and from inviting homosexual friends to the Hartman home. Thus, it is not unreasonable to infer that Brecht's homosexuality, which prompted restrictions on his lifestyle, could furnish a motive for the shooting.

Moreover, Brecht's correspondence with a fellow inmate in the Georgia prison revealed that Brecht wanted to return to Georgia to obtain his friend's release. While the precise nature of Brecht's relationship with this individual is unclear from the record, Brecht's counsel acknowledged that one of the letters had strong homosexual overtones. It is not unreasonable to infer from this evidence that Brecht

planned to return to Georgia, in violation of the conditions of his probation, to aid his friend. Additionally, it is not unreasonable to infer that Hartman, as the district attorney for Buffalo county, may have felt added responsibility in ensuring that his brother-in-law complied with his probation conditions. Thus, Brecht's desire to return to Georgia could also furnish the grounds for a dispute with Hartman and a motive for murder.

Based on the foregoing, we conclude that the circuit court did not abuse its discretion in holding that evidence of Brecht's homosexuality is probative of motive for the charged crime of first degree murder, and that the probative value of this evidence outweighs any possible prejudicial effect. We further note that the circuit court sought to minimize any prejudice to Brecht by instructing the jury on the limited purpose for which the evidence could be considered:

"The evidence that the defendant is a homosexual ... was also received solely so you could understand his presence in the Hartman home and the conditions imposed by them.

"You must not conclude that because he ... is a homosexual ... that it is proof that he committed the offense with which he is now charged. That evidence was received only to give you the whole picture of the relationship between him and the Hartmans."

Thus, we reverse that portion of the court of appeals' decision which found an abuse of circuit court discretion in regard to the admissibility of evidence on Brecht's homosexuality.

Brecht also argues that the circuit court erred in ruling that the State could cross-examine Brecht's probation officer on Brecht's worthless check conviction if Brecht called the officer to testify about Brecht's non-violent character. While we agree that this ruling was error, we do not find that the error was prejudicial to Brecht.

Section 904.04(1)(a), Stats., permits an accused to introduce evidence of a pertinent character trait and the prosecution to also introduce evidence to "rebut the same." Section 904.04(1)(a). Evidence of a defendant's character for nonviolence has been recognized as a pertinent character trait in a prosecution for first degree murder. *See King v. State*, 75 Wis.2d 26, 38–39, 248 N.W.2d 458 (1977).

[9] According to the record, Brecht's primary purpose in calling his probation agent as a witness was to have her testify about his non-assaultive, non-violent character. The circuit court ruled that once this testimony was proffered it would "open the door" to the State's cross-examination of the agent on Brecht's worthless check convictions. However, under sec. 904.04(1)(a), Stats., the State's introduction of character evidence is limited to that which rebuts the character trait being established, or in this case, Brecht's character for non-violence. Because Brecht's worthless check convictions are completely unrelated to the character trait of non-violence, the circuit court's ruling was in error.

[10] Nonetheless, while the circuit court's ruling was improper it does not constitute reversible error. Brecht's defense was not undermined by the jury's failure to hear the probation agent's opinion on Brecht's character for non-violence. Additionally, as noted earlier, the State's evidence against Brecht was strong. Thus, in the absence of a reasonable possibility that this error contributed to the jury's decision to convict Brecht, we find that the circuit court's ruling was harmless error. *Dyess*, 124 Wis.2d 525, 370 N.W.2d 222.

Finally, Brecht argues that he was denied a fair trial by the content of the State's ex parte brief submitted to the circuit court. However, upon review of the State's ex parte brief and the record, we conclude that Brecht was not denied a fair trial.

The decision of the court of appeals is reversed.

CECI, J., did not participate.

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time to maintain this file in active status, this action is STAYED and the clerk is instructed to submit a form JS–6 to the Administrative Office, thereby closing this action for statistical purposes.

IT IS FURTHER ORDERED that nothing in this order shall be considered a dismissal or disposition of the plaintiffs' § 1983 due process claim on the merits, and if the Brown County, Wisconsin Circuit Court refuses to adjudicate this § 1983 claim because it rules that this claim is time barred, then either party may renew this claim by moving this court in writing to do so. If such a motion is filed, then this stay will no longer be in effect.

WEST KEY NUMBER SYSTEM

Todd A. BRECHT, Petitioner,

v.

Gordon A. ABRAHAMSON, Respondent.

No. 90–C–603–C.

United States District Court, W.D. Wisconsin.

March 14, 1991.

Petition was filed for writ of habeas corpus. The District Court, Crabb, Chief Judge, held that: (1) state's repeated references during cross-examination and closing argument to petitioner's post-*Miranda* silence violated petitioner's due process rights, and (2) combined errors of allowing prejudicial evidence of petitioner's homosexuality and excluding testimony of his nonviolent character denied petitioner fundamentally fair trial.

Petition granted.

1. Criminal Law ⇐393(1), 721(4)

Fifth Amendment right against self-incrimination guarantees criminal defendant right to remain silent after he is arrested and precludes prosecution from commenting on silence of defendant who asserts right. U.S.C.A. Const.Amend. 5.

2. Criminal Law ⇐412.1(4)

Only a person subjected to custodial interrogation is entitled to Fifth Amendment protections embodied in *Miranda* warnings. U.S.C.A. Const.Amend. 5.

3. Criminal Law ⇐412.2(2)

Person questioned during routine traffic stop is not "in custody" and *Miranda* warnings are not required.

See publication Words and Phrases for other judicial constructions and definitions.

4. Witnesses ⇐347

It was constitutionally permissible for state to refer to defendant's pre-*Miranda* silence in cross-examining him. U.S.C.A. Const.Amend. 5.

5. Criminal Law ⇐721(4)

State's references to defendant's pre-*Miranda* silence during its case-in-chief did not violate Fifth or Fourteenth Amendments; defendant's encounter with person who gave him ride to nearby town at defendant's request, and with officer whose conversation with defendant was less coercive than ordinary traffic stop and did not implicate defendant's right to silence, were not the type of coercive or custodial situations that invoked need for Fifth Amendment protection. U.S.C.A. Const.Amends. 5, 14.

6. Witnesses ⇐349

Questioning of arresting officer in re direct examination regarding defendant's failure to explain shooting incident after his arrest did not violate Fifth Amendment; questions by defense counsel opened door to state's further inquiry about defendant's remarks to arresting officer. U.S.C.A. Const.Amend. 5.

7. Criminal Law ⇐721(4)
Witnesses ⇐347

State's reference to murder defendant's post-*Miranda* silence during cross-examination of defendant and in closing argument violated defendant's Fifth Amendment right; clear implication of repeated remarks was that defendant's fai

ure to explain accidental nature of shooting prior to trial evidenced his guilt and circumstantial evidence against defendant fell short of overwhelming. U.S.C.A. Const. Amend. 5.

8. Habeas Corpus ⇐452, 765

Whether constitutional error is harmless is a question of federal law in habeas proceeding; it is not subject to presumption of correctness given to state court's findings of fact.

9. Habeas Corpus ⇐442, 490(1)

District court in habeas proceeding must determine whether reasonable possibility exists that errors complained of might have contributed to conviction, and question becomes whether absent constitutionally forbidden evidence, honest and fair-minded jurors might have well brought in a not guilty verdict.

10. Habeas Corpus ⇐706

Respondent in habeas proceeding has burden of proving constitutional error harmless.

11. Habeas Corpus ⇐490(1)

Admissibility of evidence in state criminal trial is generally a matter of state law in a habeas proceeding.

12. Habeas Corpus ⇐490(1)

District court can issue writ of habeas corpus only when erroneous state evidentiary ruling is of such magnitude that result is denial of fundamental fairness and consequently a denial of due process. U.S.C.A. Const.Amends. 5, 14.

13. Habeas Corpus ⇐490(1)

In deciding whether writ of habeas corpus should issue, district court must determine whether probative value of evidence is greatly outweighed by its prejudicial effect on accused.

14. Constitutional Law ⇐268(10)
Criminal Law ⇐338(7)
Homicide ⇐163(1)

Combined errors of allowing prejudicial evidence of murder defendant's homosexuality and effectively excluding testimony on his nonviolent character denied defendant due process; although it was contended that evidence of homosexuality was relevant to issue of defendant's motive for murder, there had been no arguments between defendant and victim regarding same and evidence that defendant was nonviolent was directly relevant to central issue of whether shooting was accidental or intentional. U.S.C.A. Const.Amends. 5, 14.

Stan Thomas, Stevens Point, Wis., for petitioner.

Jeffrey M. Gabrysiak, Asst. Atty. Gen., Madison, Wis., for respondent.

CRABB, Chief Judge.

This is a petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Petitioner, an inmate at the Dodge Correctional Institution in Waupun, Wisconsin, contends that he is in custody in violation of the Constitution of the United States. Petitioner seeks relief on three separate grounds: 1) that the state's use of his pretrial silence infringed on his Fifth and Fourteenth Amendment rights; 2) that certain rulings by the state court involving evidence of his homosexuality and rebuttal evidence of a prior worthless check conviction violated his due process rights; and 3) that the trial court's reliance on an ex parte trial brief violated his due process rights. Petitioner has exhausted his state remedies as required under 28 U.S.C. § 2254.

After reviewing the entire record, I conclude that references to petitioner's post-*Miranda* silence on cross-examination and in closing argument violated his due process rights and did not constitute harmless error. However, the state's references to petitioner's pre-*Miranda* silence did not infringe on his constitutional rights. Also, I conclude that the state court erred in admitting evidence about petitioner's homosexuality and in ruling that testimony on a prior worthless check conviction would be admissible to rebut testimony on petitioner's non-violent character. Taken together, these evidentiary rulings are sufficiently prejudicial to violate petitioner's rights to a fundamentally fair trial. Finally, I conclude that petitioner's claim regarding the state's ex parte trial brief has no merit in light of petitioner's consent to the use of ex parte briefs and the absence of improper material in the brief.

In habeas corpus actions, state court findings of fact are presumed correct unless upon consideration of the record as a whole, the federal court concludes that factual determinations are not "fairly supported" by the record. 28 U.S.C. § 2254(d)(8); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1019 (7th Cir.1987). Petitioner does not object to the accuracy or completeness of the state court findings. Therefore, I adopt the following facts paraphrased from the Wisconsin supreme court's decision in *State v. Brecht*, 143 Wis.2d 297, 421 N.W.2d 96 (1988), and the Wisconsin Court of Appeals' decision in *State v. Brecht*, 138 Wis.2d 158, 405 N.W.2d 718 (Ct.App.1987), supplemented by pertinent facts from the record.

Facts Found by State Courts

On October 17, 1985, petitioner shot and wounded his brother-in-law, Roger Hartman, who was the district attorney for Buffalo County, Wisconsin. Hartman died several weeks later. At his trial, petitioner testified that the shooting was accidental. However, the jury found him guilty of first degree murder.

Evidence at the trial disclosed the following: on October 12, 1985, Molly and Roger Hartman went to the Georgia State prison to secure the release of petitioner, who is Molly Hartman's younger brother. Petitioner's release from prison and placement on probation were conditioned on payment of $3,750 in restitution. The Hartmans paid his restitution and obtained his release and the transfer of his probation to Wisconsin.

The Hartmans brought petitioner to their home in Alma, Wisconsin, where he was to stay until an opening became available in an Eau Claire halfway house. The Hartmans told petitioner that while he lived in their home he was to refrain from drinking and from homosexual activity in the Alma area.

Petitioner testified that on the day of the shooting he had been drinking and playing with a gun that belonged to Roger Hartman while Hartman was at work and Molly Hartman was out shopping. Petitioner had been using the gun to shoot at tin cans in the Hartman's yard, when he saw Roger Hartman pull into the driveway. Because he did not want Hartman to see him with the gun, petitioner ran into the rear garage and entered a downstairs hallway. Petitioner explained that he intended to replace the gun in the upstairs room where he had found it.

Petitioner testified that he had stopped to listen for Hartman, heard nothing, and started running for the stairs to the upper level of the house when he tripped and the gun discharged. A bullet struck Hartman in the back.

Petitioner yelled to Hartman and looked for him but Hartman had disappeared. Petitioner then took Molly Hartman's car and drove around the area looking for Hartman. When petitioner saw Hartman at the door of a neighbor's house, petitioner drove off in the car. The Hartman car was observed traveling at a faster than normal speed away from Alma and toward Fountain City.

Neighbors of the Hartmans testified that Roger Hartman came to their door seeking help and told them that petitioner had shot him. Police officers who had surveyed the Hartman residence after the shooting testified that they had found beer cans in the house, and a liquor bottle and a soda can with a bullet hole in it and a spent .22 casing in the backyard. Experts from the State Crime Laboratory testified that petitioner's fingerprints were on an ammunition box and on a brandy bottle found at the Hartman home. There was additional testimony that the doorway area leading into the hall from the garage was covered with tightly stretched carpet and that nothing was observed on which one could trip.

Meanwhile, petitioner had driven the Hartman car into a ditch near Fountain City, rendering the car inoperable. Officer Zeiler arrived and offered petitioner assistance with the car, but petitioner told Zeiler

that his sister would call a wrecker for him. Petitioner then caught a ride from a stranger, Melvin Schlesselman, to the nearest town, Winona, Minnesota. He did not mention the shooting incident to either Zeller or Schlesselman.

In Winona, petitioner was stopped by the police in a shopping center. When his identity was ascertained, he was arrested for the shooting of Hartman in Wisconsin. Petitioner told Officer Papke, one of the arresting officers, that it was a mistake and that he wanted to talk with "somebody that would understand [him]." Neither petitioner's testimony nor that of the police officer indicates that petitioner explained the shooting incident upon arrest.

The record is unclear when petitioner received his *Miranda* warnings. The state submitted testimony by two of the five officers involved in the arrest, who testified that petitioner was not given his *Miranda* warnings in their presence. However, the record does reflect that petitioner received his *Miranda* warnings at his initial appearance.

On November 11, 1985, Roger Hartman died. A coroner testified that the bullet wound was a substantial factor in producing his death. He also testified that the bullet entered Hartman's back and exited his chest, traveling on a basically horizontal to slightly downward trajectory.

At trial, the state questioned Zeller, Schlesselman and Papke during its case-in-chief about petitioner's failure to mention Hartman's condition and the accidental nature of the shooting. Additionally, the state attempted to impeach petitioner's credibility directly by cross-examining him on his pre-trial silence concerning the shooting and by making reference in closing argument to his silence.

The first reference to petitioner's silence was elicited from officer Zeller, the officer who spoke to petitioner when his car was in the ditch.

Q. Did you speak with this person [petitioner]?

A. Yes.

Q. What did you say?

A. I asked him for his name, and I also asked him if he needed a wrecker, and where he was from.

Q. What did he respond?

A. He stated his name was Todd Brecht, and he stated that he was from Alma. In reference to the wrecker, he said, "My sister will get a wrecker from Alma."

Q. Did he say anything else?

A. No.

Schlesselman testified on direct examination by the state:

Q. At any time during that period of time did he ever ask you to call and [sic] ambulance for anyone?

A. No sir.

Q. Did he ever ask you to call the police for him?

A. No sir.

Q. Did he ever mention a Roger Hartman to you?

A. No sir.

On cross-examination of Papke, one of the officers who apprehended petitioner in Winona, petitioner's counsel elicited the following:

Q. After you had taken him into custody he made a statement to you as you approached the squad car didn't he?

A. Yes.

Q. In fact he told you that it was a big mistake, he wanted to talk to someone.

A. Yes he did.

Q. He never explained further to you what he meant by "big mistake," did he?

A. No he didn't.

In response, the state conducted redirect examination of Papke.

Q. Officer Papke did you or anyone else in your presence advise the defendant of his constitutional rights?

A. No.

Q. Now you stated he said it was a big mistake—did he say what was a big mistake?

A. No he didn't.

Q. Did he offer any explanation about anything whatever?

A. No.

Q. Was he advised as to why he was being taken into custody?

A. Yes he was.

Q. Again you stated what?

A. I told him he was sought by Buffalo County authorities for a shooting incident in Wisconsin.

Q. Did he explain anything about a shooting incident to you?

A. No he didn't.

Q. To anyone in your presence?

A. Not to my knowledge, no.

The state elicited testimony from Deputy Bratner during its case-in-chief.

Q. Did you arrest the defendant?

A. I served the arrest warrant on him, yes.

Q. Did you give him [sic] Miranda warning?

A. No.

On cross-examination, the state engaged petitioner in the following exchange:

Q. In fact the first time you have ever told this story is when you testified here today was it not?

A. You mean the story of what actually happened?

Q. Yes.

A. I knew what happened, I'm just telling it the way it happened. yes, I didn't have a chance to talk to anyone. I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir.

On re-cross examination, the state inquired:

Q. Did you tell anyone about what had happened in Alma?

A. No I did not.

During closing argument, the state made the following comments:

> and remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence.... he made no statements to the law enforcement officers....
>
> He sits back here and sees all of our evidence go in and then comes out with this crazy story....
>
> I know what I'd say, I'd say, I'd say "hold on, this was a mistake, this was an accident, let me tell you what happened," but he didn't say that did he. No, he waited until he hears our story.

The state also sought to introduce evidence of petitioner's homosexuality to establish a possible motive for the shooting. The trial court permitted such evidence, over petitioner's objection, noting its relevancy to the issue of motive. During trial, the state produced letters petitioner had written to an inmate in the Georgia prison where petitioner had been incarcerated. Additionally, the state elicited testimony from Molly Hartman that her husband had disapproved of petitioner's homosexuality. However, she gave conflicting testimony as to whether her husband had communicated this disapproval directly to petitioner. The trial court gave the following instruction to the jury:

> The evidence that the defendant is a homosexual ... was also received solely so you could understand his presence in the Hartman home and the conditions imposed by them.
>
> You must not conclude that because he ... is a homosexual ... that it is proof that he committed the offense with which he is now charged. That evidence was received only to give you the whole picture of the relationship between him and the Hartmans.

Petitioner sought to call his probation officer to testify about petitioner's non-violent character. The trial court ruled that the introduction of such evidence would also permit the state to cross-examine the officer about petitioner's conviction for writing worthless checks. Consequently, petitioner chose not to call his probation officer and rested his case.

Both parties stipulated to the filing of ex parte briefs to the court. These briefs were subsequently filed in open court.

After the jury verdict, petitioner was sentenced to life in prison with a penalty enhancement for use of a dangerous weapon and for being a repeat offender. On appeal, the Wisconsin Court of Appeals reversed the conviction on the grounds that the state's references to petitioner's silence impermissibly infringed upon petitioner's right to silence and to a fair trial, and that such references were prejudicial. The court further concluded that the trial court erred in admitting evidence of petitioner's homosexuality and in ruling that the state could cross-examine the probation officer on petitioner's worthless checks conviction.

Additional Facts From The Record

At the pretrial hearing on petitioner's motion in limine to exclude certain evidence, including evidence of his sexual preference, the state represented to the trial court that "Mrs. Hartman didn't have a lot of problem with [petitioner's homosexuality] but Mr. Hartman did and made this known to the defendant. All of this Mrs. Hartman will testify about." The trial court ruled that, despite its prejudicial nature, the evidence had some bearing on the relationship between Hartman and petitioner and a possible motive. At trial, Molly Hartman testified as follows:

Q. Did [petitioner] tell you that he was a homosexual?

A. Yes.

Q. That week after returning home did you and Roger discuss the homosexuality with Todd?

A. Yes.

Q. On about how many occasions?

A. 3–4 perhaps

Q. What was Roger's attitude concerning Todd's homosexuality?

. . . . . .

A. Roger had a hard time accepting it, he could not udnerstand [sic] it.

On cross-examination by petitioner's counsel, Molly Hartman testified further.

Q. ... Now you indicated ... that Roger couldn't understand [petitioner's] homosexuality. Could you explain what you meant by that?

A. Well I guess it's just that way, I guess as far as Roger was concerned he couldn't understand homosexuality, he couldn't understand why that would be a male preference.

Q. Did he express the fact that he could not understand it to Todd?

A. I don't know.

Q. Did he ever do that in your presence?

A. No.

Q. Now you also indicated that Roger had a hard time accepting Todd's homosexuality or bisexuality. Is that the same as not being able to understand it, or is that something different that you were trying to explain?

A. I guess that is a little different.

Q. Could you explain what your understanding was of what was said in terms of how he had a hard time accepting it?

A. I guess it's just the conservative attitude that—he didn't want a brother-in-law who was a homosexual.

Q. Did he openly express this to Todd?

A. No.

Q. Did he ever do so in your presence?

A. No.

Q. So if I understand it then, his attitude of having a hard time in accepting and not being able to understand it were things that had been Roger's reaction to the things that were communicated to you in private?

A. Yes.

. . . . . .

Q. Were there ever any cross words between Roger and Todd that you were aware of?

A. I'm not aware of any arguments.

Q. And at the time Todd was there you thought basically that their relationship, yours and Todds [sic], and Todd's and Roger's relationship was a good relationship?

A. Yes.

Molly Hartman also corroborated petitioner's testimony that he had problems walking and jogging because of a previous foot injury.

One of the neighbors who assisted Hartman just after the shooting testified that she asked Hartman whether he thought petitioner had anything against him. Hartman replied, "I don't know."

After accepting the state's petition for review, the Supreme Court of Wisconsin reversed the decision by the Wisconsin Court of Appeals. The supreme court held that the references to petitioner's pre-*Miranda* silence were not constitutional violations. Although it found that the references to petitioner's post-*Miranda* silence did violate petitioner's due process rights, the supreme court found the references to constitute harmless error. In addition, the supreme court concluded that the trial court did not abuse its discretion in admitting evidence of petitioner's homosexuality, and that it committed harmless error in ruling that the worthless check convictions were admissible rebuttal evidence to the probation officer's proposed testimony on petitioner's non-violent character. Finally, the supreme court concluded that petitioner was not denied a fair trial by the content of the state's ex parte trial brief.

OPINION

Use of Pre-trial Silence

[1] Petitioner contends that all use by the state of his pretrial silence violates his rights under the Fifth and Fourteenth Amendments.[1] The Fifth Amendment right against self-incrimination guarantees a criminal defendant the right to remain silent after he is arrested and precludes the prosecution from commenting on the silence of a defendant who asserts the right. *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106 (1965). To safeguard Fifth Amendment rights, the Supreme Court requires that a person taken into custody be advised immediately "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has a right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning." *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966).

In a later case, *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S.Ct. 2240, 2244, 49 L.Ed.2d 91 (1976), the Court recognized that an arrestee's silence after receipt of *Miranda* warnings may be nothing more than an exercise of the rights explained in the warnings and is thus, "insolubly ambiguous." The Court found it fundamentally unfair for the state to offer implicit assurances in the *Miranda* warnings and then use subsequent silence to impeach an accused's explanation at trial. The Court concluded that "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* 426 U.S. at 619, 96 S.Ct. at 2245.

The Supreme Court refused to extend its holding in *Doyle* to use of an accused's pre-arrest, pre-*Miranda* silence. *Jenkins v. Anderson*, 447 U.S. 231, 238–240, 100 S.Ct. 2124, 2129–30, 65 L.Ed.2d 86 (1980) (impeachment by pre-arrest, pre-*Miranda* silence does not violate the Fifth or the Fourteenth Amendment). And, in *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the Court allowed the government in a murder case to use the defendant's post-arrest silence to impeach his claim that he acted in self-defense, when he had not received any *Miranda* warnings during the period in which he remained silent immediately after his arrest. *Jenkins*, *Fletcher*, and later holdings confirm that *Doyle* rests on the fundamental unfairness inherent in assuring a defendant that he may remain silent and then impeaching him with his silence at trial *Greer v. Miller*, 483 U.S. 756, 763, 107 S.Ct.

1. Petitioner has filed no brief responding to the Wisconsin supreme court decision. The initial brief in support of the petition for a writ of habeas corpus consists primarily of a photocopied copy of the brief filed with the supreme court. Petitioner filed no reply brief to respondent's brief in opposition to the petition.

3102, 3107, 97 L.Ed.2d 618 (1987). "Thus, 'absen[t] the sort of affirmative assurances embodied in the *Miranda* warnings,' the Constitution does not prohibit the use of a defendant's postarrest silence to impeach him at trial." *Id.* (quoting *Fletcher*, 455 U.S. at 607, 102 S.Ct. at 1312).

[2,3] Neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has addressed the precise question whether the state's reference to pre-*Miranda* silence in its case-in-chief violates the Fifth Amendment. *Fencl v. Abrahamson*, 841 F.2d 760, 766 (7th Cir.1988). It is clear, however, that only a person subjected to custodial interrogation is entitled to the Fifth Amendment protections embodied in the *Miranda* warnings. *See Berkemer v. McCarty*, 468 U.S. 420, 434, 104 S.Ct. 3138, 3147, 82 L.Ed.2d 317 (1984). A person questioned during a routine traffic stop, for instance, is not "in custody" and *Miranda* warnings are not required. *Id.* 468 U.S. at 442, 104 S.Ct. at 3151.

[4,5] I turn now to the challenged references to petitioner's silence in this case. I agree with the Wisconsin supreme court that it was constitutionally permissible for the state to refer to petitioner's pre-*Miranda* silence when cross-examining him. *Jenkins*, 447 U.S. at 238–240, 100 S.Ct. at 2129–2130; *Fletcher*, 455 U.S. at 607, 102 S.Ct. at 1312. I agree also that the state's references to petitioner's pre-*Miranda* silence during its case-in-chief did not violate the Fifth or Fourteenth Amendment. Petitioner's encounters with Schlesselman and Zeller were not the type of coercive or custodial situations that invoke the need for Fifth Amendment protection. *See Berkemer*, 468 U.S. at 434, 104 S.Ct. at 3147. Schlesselman is not a police officer and gave petitioner a ride to a nearby town at petitioner's request. Although Zeller is an officer, his conversation with petitioner was even less coercive than an ordinary traffic stop and did not implicate petitioner's right to silence. The testimony elicited from Deputy Bratner, the arresting officer, made no reference to petitioner's silence.

[6] The questioning of Officer Papke requires a different analysis. The state asked Papke specifically about petitioner's failure to explain the shooting incident after his arrest while he was in custody. However, this inquiry was in response to questions posed by petitioner's counsel. On cross-examination of Papke, petitioner's counsel asked whether petitioner had stated that "it was a big mistake" and "he wanted to talk to someone." Petitioner's counsel also asked whether petitioner had ever explained to Papke what he meant by "big mistake." These questions opened the door to the state's further inquiry about the extent of petitioner's remarks to Papke. *See United States v. Robinson*, 485 U.S. 25, 34, 108 S.Ct. 864, 870, 99 L.Ed.2d 23 (1988) (no Fifth Amendment violation to refer to defendant's silence in fair response to remarks made by defense counsel). The questioning of Papke on redirect examination did not violate petitioner's constitutional rights.

[7] However, the situation is different with respect to the state's references to petitioner's post-*Miranda* silence during its cross-examination of petitioner and in closing argument. These references constitute due process violations under *Doyle*. The clear implication of the state's repeated remarks was that petitioner's failure to explain the accidental nature of the shooting prior to trial evidenced his guilt. The Wisconsin supreme court recognized that the references were a violation of the Constitution, but found them to be harmless. I cannot agree.

[8,9] Whether a constitutional error is harmless is a question of federal law. It is not subject to the presumption of correctness given to the state court's findings of fact. *Savory*, 832 F.2d at 1018; *see United States v. Flannigan*, 884 F.2d 945, 950–51 (7th Cir.1989) (federal court not bound by state court's ruling that constitutional error is harmless). "Constitutional error is reversible error unless it is harmless beyond a reasonable doubt." *United States v. Shue*, 766 F.2d 1122, 1132 (7th Cir.1985) (citing *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) and *Chapman v. California*, 386 U.S. 18,

87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). A district court must determine whether a reasonable possibility exists that the errors complained of might have contributed to the defendant's conviction. *Savory*, 832 F.2d at 1019. The question becomes "whether absent the constitutionally-forbidden evidence, honest and fair-minded jurors might very well have brought in not-guilty verdicts." *Burns v. Clusen*, 798 F.2d 931, 943 (7th Cir.1986) (citing *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828).

[10] Respondent has the burden of proving a constitutional error harmless. *Fencl*, 841 F.2d at 768. In most cases, the Court of Appeals for the Seventh Circuit requires that the other evidence of guilt be "overwhelming" before concluding that a constitutional error was harmless. *Savory*, 832 F.2d at 1020; *Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir.1988) (error not harmless where evidence of guilt was impressive, but not overwhelming).

In this case, there were at least four occasions during cross-examination and closing argument on which the state made reference to petitioner's failure to explain the accidental nature of the shooting at any time before trial. The Supreme Court of Wisconsin concluded that "the infrequency of the references in the context of the entire trial mitigated any possible prejudicial effect on the jury." *Brecht*, 143 Wis.2d at 318, 421 N.W.2d at 104.

It is true that the references are not extensive and the trial transcript is lengthy, but the state's references to petitioner's post-*Miranda* silence are crucial. Petitioner admitted shooting Hartman. The sole issue for the jury was whether the shooting was accidental or intentional. With the defense hinging on petitioner's credibility, the state's remarks that he simply concocted a "crazy story" at the time of trial may have been determinative.

Moreover, the state's circumstantial evidence that petitioner intended to shoot Hartman falls short of overwhelming. Although Hartman told several people that petitioner had shot him in the back, he also indicated that he knew of no reason why petitioner would shoot him intentionally. Petitioner did not call for help for Hartman and fled in Hartman's car, but this evidence is as consistent with a panic-stricken reaction to a horrible accident as it is with an intentional homicide. Police officers found nothing at the scene that could have tripped petitioner, but both petitioner and Molly Hartman testified to petitioner's foot injury and even non-injured people have been known to trip for no apparent reason. In addition, there is virtually no evidence of motive. In his brief, respondent suggests that "the most probable motive for the murder was the petitioner's desire to raise money for his homosexual friend Darrell Mason and to obtain his freedom so he could return to Georgia to be with him." It is questionable whether the record supports the proposition that petitioner wanted to leave Wisconsin. Even if it did, this says nothing about petitioner's motive for murdering his brother-in-law. Finally, respondent points to the evidence that the bullet entered Hartman at a horizontal trajectory. This evidence may be inconsistent with petitioner's claim that the shooting was an accident, but it is not conclusive. A rational jury could have believed petitioner's story and reconciled the supposed inconsistencies. *Shue*, 766 F.2d at 1133.

Because the state's effort to present petitioner's story as a recent fabrication by referring to his post-*Miranda* silence may have influenced the verdict, I conclude that respondent has not met his burden of proving that the use of petitioner's post-*Miranda* silence constitutes harmless error. Accordingly, I will grant the petition for a writ of habeas corpus. For the sake of completeness, I will address petitioner's other claims.

Evidentiary Rulings

[11–14] Petitioner contends that the trial court's evidentiary rulings involving his homosexuality and the testimony of his probation officer violated his due process rights. The admissibility of evidence in a state criminal trial is generally a matter of state law. *Flannigan*, 884 F.2d at 953. A district court can issue a writ of habeas corpus only when an erroneous state evidentiary ruling "is of such magnitude that

the result is a denial of fundamental fairness" and consequently, a denial of due process. *Dudley*, 854 F.2d at 970. In deciding whether a writ should issue, a court must determine whether the probative value of the evidence is greatly outweighed by its prejudicial effect on the accused. *Flannigan*, 884 F.2d at 953.

Respondent contends that the evidence of petitioner's homosexuality was relevant to the issue of motive. In response to petitioner's motion in limine on this issue, the state represented to the trial court that it would provide evidence that Hartman disapproved of petitioner's sexual preference and made that known to him. At trial the state's evidence was that Hartman discussed petitioner's homosexuality with him on several occasions, did not understand or accept petitioner's homosexuality and restricted him from engaging in homosexual relationships while staying with the Hartmans. Discussing a person's sexual preference and setting restrictions on that person's behavior while staying in one's home are not equivalent to communicating disapproval or condemnation to that person. The state's evidence might be relevant to a possible motive if there was any evidence to indicate that petitioner and Hartman had argued about the restrictions or about petitioner's sexuality. There was none. Molly Hartman testified specifically that her husband never indicated his feelings about petitioner's sexuality in her presence and that she was not aware of any disagreements between petitioner and Hartman.

Respondent argues also that evidence of petitioner's homosexuality was relevant to his motivation for returning to Georgia to help his friend, Darrell Mason. Although respondent asserts that petitioner's counsel admitted that at least one letter petitioner composed to Mason had "homosexual overtones," there is no proof in the record that petitioner's relationship with Mason was sexual. Even assuming such a relationship, it is difficult to connect petitioner's alleged desire to return to Georgia with a motive for murdering Hartman.

I conclude that the evidence of petitioner's homosexuality was not relevant to any purported motive petitioner had to shoot his brother-in-law. Other courts have recognized that "evidence of homosexuality is extremely prejudicial" in a criminal trial and that even a limiting instruction to the jury is "not sufficient to obviate the prejudice." *United States v. Gillespie*, 852 F.2d 475, 479 (9th Cir.1988).

The question remains whether the erroneous admission of evidence about petitioner's homosexuality was of the magnitude to deny petitioner a fundamentally fair trial. Standing alone, the prejudicial effect might not constitute a denial of due process. However, the trial court also erred in ruling that evidence of worthless check violations would be admissible if petitioner called his probation officer to testify to his non-violent character. As the Wisconsin supreme court noted, Wis.Stat. § 904.04(1)(a) limits the state's introduction of character evidence to that which rebuts the character trait of non-violence. *Brecht*, 143 Wis.2d at 322, 421 N.W.2d at 106. The court held that because petitioner's "worthless check convictions are completely unrelated to the character trait of non-violence, the circuit court's ruling was in error." *Id.* at 323, 421 N.W.2d at 106.

Other than petitioner's own testimony and brief testimony by an officer who observed petitioner after he was arrested and in jail custody, the probation officer's testimony was to be the only testimony offered for the defense. Evidence that petitioner was non-violent is directly relevant to the central issue whether the shooting was accidental or intentional. The combined errors of allowing prejudicial evidence of petitioner's homosexuality and effectively excluding testimony on his non-violent character are significant in a case lacking overwhelming evidence of guilt. Accordingly, I conclude that petitioner would be entitled to a writ of habeas corpus based on his claim that evidentiary rulings denied him due process.

Ex Parte Trial Brief

Finally, petitioner contends that the trial court's acceptance of the state's ex parte brief constitutes a denial of due process. Petitioner argues that through its brief, the state improperly tried to persuade the court of petitioner's guilt before trial. However, petitioner stipulated to the submission of ex parte briefs and filed his own with the court. I agree with the Wisconsin supreme court that nothing challenged in the state's ex parte brief denied petitioner a fundamentally fair trial. *Brecht*, 143 Wis.2d at 323, 421 N.W.2d at 106. Accordingly, I conclude that petitioner is not entitled to a writ of habeas corpus on the ground that the state's ex parte trial brief violated his right to due process.

ORDER

IT IS ORDERED that petitioner's petition for a writ of habeas corpus is GRANTED on the grounds that petitioner's right of due process was violated by the state's improper references to petitioner's post-*Miranda* silence and the trial court's erroneous evidentiary rulings. On all other grounds, the petition is DENIED.

Execution of the writ of habeas corpus will be stayed for sixty (60) days from the date of this order to permit the state to provide petitioner a new trial. If petitioner is not provided a new trial within that time, the writ will issue.

Bailey L. WIENER and Lee R. Wiener, Plaintiffs.

v.

FARM CREDIT BANK OF ST. LOUIS, Eastern Arkansas Planting Co., and N.S. Garrott & Sons, Defendants.

Civ. No. J-C-90-81.

United States District Court, E.D. Arkansas, Jonesboro Division.

Jan. 24, 1991.

Optionees brought action against bank and prior owners for specific performance. The District Court, Eisele, Chief Judge, held that: (1) Agricultural Credit Act and its provision giving farmers right of first refusal to repurchase land following foreclosure did not apply retroactively; (2) options given by bank were subject only to any right of first refusal which the prior owners might have as a result of the Act; (3) optionees validly exercised their options; and (4) Agricultural Credit Act did not create prior right of action for prior owners against bank for failing to offer right of first refusal to lease their farms or for punitive damages.

Ordered accordingly.

1. Statutes ⇐263

There is a strong presumption against retroactivity of statutes.

2. Banks and Banking ⇐408

Agricultural Credit Act and its provision granting farmer right of first refusal to repurchase his property following loan foreclosure does not apply retroactively and did not apply to bank's subsequent sale of agricultural real estate which was acquired by the bank prior to the effective date of the Act, Jan. 6, 1988. Farm Credit Act of 1971, § 4.36, as amended, 12 U.S.C.A. § 2219a.

3. Vendor and Purchaser ⇐18(2)

Where neither bank nor optionees objected to inclusion of language in extension of option making option "subject to" any rights of first refusal of the prior owner, those prior owners could not complain that the insertion of the language rendered the option invalid and unenforceable due to a lack of consideration for the extension.

4. Vendor and Purchaser ⇐18(2)

Consideration for inclusion of language in extension of option in order to make the option subject to any right of first refusal of prior owners was provided by the bank's agreement to extend the option's expiration date.

5. Vendor and Purch

Options which w prior owners' "right sions of the Farm Cr amended by the Agricu 1987," were subject to first refusal granted t where prior owners h first refusal, the optio to or conditioned upo right of first refusal th given to the prior ow Act of 1971, § 4.36, a C.A. § 2219a.

6. Vendor and Purch

Any contract for such rights as are poss

7. Vendor and Purch

Where extension of in force when bank e for sale to third party, that third party only s had at that time, which the option.

8. Vendor and Purch

Sales contract did previously given by t the optionee had not ye where the option had

9. Specific Performan

One possessing an estate is entitled only t damages, not to sp when the property is s to exercise of the op purchaser is without s tion.

10. Evidence ⇐213(1)

Prohibition on ev compromise did not pr evidence of offer to knowledge of options given to a third party Rule 408, 28 U.S.C.A.

11. Vendor and Purch

It was not necess have actually physical tracts in order to be existence at the time

ED for an assessment of IHB's costs and attorneys' fees in this litigation. With that one exception, the remainder of the disposition below is AFFIRMED.

Todd A. BRECHT, Petitioner-Appellee,

v.

Gordon A. ABRAHAMSON, Superintendent, Dodge Correctional Institution, Respondent-Appellant.

No. 91-1835.

United States Court of Appeals, Seventh Circuit.

Argued July 10, 1991.

Decided Sept. 26, 1991.

Rehearing and Rehearing En Banc Denied Nov. 20, 1991.

Following defendant's murder conviction, and reversal of that conviction, 138 Wis.2d 158, 405 N.W.2d 718, appeal was taken. The Supreme Court of Wisconsin, 143 Wis.2d 297, 421 N.W.2d 96, reinstated conviction. Defendant petitioned for writ of habeas corpus. The United States District Court for the Western District of Wisconsin, Barbara B. Crabb, Chief Judge, 759 F.Supp. 500, granted petition. Appeal was taken. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) evidence of defendant's homosexuality did not warrant habeas relief; (2) improper reference in closing argument to defendant's post-*Miranda* warning silence was harmless; and (3) standard of harmlessness on collateral enforcement of prophylactic rules is whether error had substantial and injurious effect or influence in determining jury's verdict.

Reversed.

Cudahy, Circuit Judge, issued opinion concurring in judgment.

1. **Habeas Corpus** ⇐450

Habeas corpus court should have asked whether state trial court conducted trial that was, all things considered, adequate to sift guilt from innocence, rather than asking whether there were errors, and whether those were harmless beyond reasonable doubt. 28 U.S.C.A. § 2254(a).

2. **Habeas Corpus** ⇐490(1)

Admission of evidence pertaining to murder defendant's homosexuality, on ground that evidence was relevant to issue of defendant's motive for murder, did not warrant habeas relief. 28 U.S.C.A. § 2254(a).

3. **Habeas Corpus** ⇐490(6)

Even if Wisconsin law were violated by ruling that if probation officer testified as to defendant's nonviolent character prosecution could use defendant's bad-check convictions in cross-examination, there was no violation of United States Constitution; since probation officer did not testify, and convictions were never laid before jury, Court of Appeals could not decide how they would have been used, and with what effect, if any, on trial.

4. **Criminal Law** ⇐721(4)
Witnesses ⇐347

Where defendant was not informed before his arraignment of his privilege of silence, prosecution's questions and arguments about defendant's silence before arraignment were proper, while questions and remarks in closing argument concerning whether defendant told his story "at any time" before trial were error, as they referred in part to post-*Miranda* warning silence. U.S.C.A. Const.Amend. 5.

5. **Habeas Corpus** ⇐497

Improper reference in closing argument to defendant's post-*Miranda* warning silence was harmless, barring habeas relief; error did not have substantial and injurious effect or influence in determining jury's verdict, as there were many more, and entirely proper, references to his silence preceding arraignment. U.S.C.A. Const.Amend. 5; 28 U.S.C.A. § 2254(a).

6. **Criminal Law** ⇐407(1)

Supreme Court's *Doyle v. Ohio* decision, prohibiting prosecution's use of defendant's postarraignment silence, is prophylactic rule; it has nothing to do with defendant's guilt and everything to do with insisting that government play straight with those it prosecutes.

7. **Habeas Corpus** ⇐450

Standard of harmlessness on collateral enforcement of prophylactic rules is whether error had substantial and injurious effect or influence in determining jury's verdict.

Allen E. Shoenberger, Michael A. Moynihan (argued), Chicago, Ill., for petitioner-appellee.

Jeffrey M. Gabryniak (argued), Office of Atty. Gen., Wisconsin Dept. of Justice, Madison, Wis., for respondent-appellant.

Before CUDAHY and EASTERBROOK, Circuit Judges, and PELL, Senior Circuit Judge.

EASTERBROOK, Circuit Judge.

Todd A. Brecht was serving time in Georgia for felony theft when his sister Molly Hartman paid the restitution for Brecht's crime and took temporary custody of him while he awaited an opening in a halfway house. This created a sticky situation because Molly's husband Roger was the district attorney for Buffalo County, Wisconsin. There cannot be many public prosecutors who want to have a felon about the house. The awkwardness of putting up the black sheep of the family was augmented by the fact that Brecht, a heavy drinker, is also homosexual, which Roger disapproved. The Hartmans 'explained' to Brecht, when they picked him up at the prison gate on October 10, 1985, that there was to be no drinking or homosexual activity so long as he remained at their home. They reiterated that theme at least twice more before October 17, when Brecht shot and killed Roger Hartman. Wisconsin convicted Brecht of murder and sentenced him to life imprisonment. A district court has ordered him released. 759 F.Supp. 500 (W.D.Wis.1991). Whether the writ of habeas corpus should issue depends on the standard of harmless error employed on collateral review.

I

While Roger Hartman was at work on October 17 and Molly Hartman was shopping, Brecht raided the Hartmans' liquor cabinet for beer and brandy, and their gun cabinet for a rifle. Out in the back yard, Brecht opened fire on some cans. When Roger returned, Brecht shot him in the back and fled in Molly's car. Roger crawled up the hill to a neighbor's house to summon help (the phone on the ground floor of the Hartman home was inoperable, Brecht having taken a receiver off the hook upstairs). Help came, but the injury was too serious; Roger died on November 11. Roger named his assassin to the neighbor and an officer who arrived with the medics. Brecht's initial flight ended after he drove the car into a ditch. When a police officer stopped to inquire, Brecht asserted that Molly Hartman knew about the wreck and had called a tow truck. That lie was coupled with silence about the shooting. Brecht hitched a ride to Winona, Minnesota, where the police nabbed him in a shopping center. Brecht first lied about his identity and when that did not work asked to talk with "somebody that would understand me." He said nothing else.

Come the trial, Brecht admitted shooting Roger Hartman but contended that the rifle discharged by accident. According to Brecht, Roger's return caught him by surprise; he did not want Roger to see him with a gun and raced to take the rifle upstairs before Roger entered the house. He tripped as he was heading toward the stairs, Brecht testified, and the gun went off as he fell. He tried to find Roger to offer aid, Brecht maintained, but Roger had left the house. Only after seeing Roger at the neighbor's door did Brecht drive away in panic, according to his tale.

It is unlikely, but not impossible, that someone would run with his finger on the trigger of a cocked bolt-action rifle. The

state thought the path of the bullet dispositive. The coroner testified that the bullet entered Roger Hartman's upper body on a horizontal to slightly downward trajectory, inconsistent with a claim that the weapon discharged as its bearer was falling. The rifle was found on the patio near the pool (where Roger was shot), not inside near the stairs; a live round was jammed in the chamber (from which a jury could have inferred that Brecht tried to fire another shot). In further response to the defense of accident, the prosecutor pointed to (a) Brecht's failure to summon aid for Roger; (b) his flight; (c) his lies to the police; (d) his failure to say to anyone, at any time before trial, that the shooting was accidental; and (e) his homosexuality. The first four were offered to impeach Brecht's testimony, and the fifth to establish a motive—hostility to Roger, reciprocating Roger's hostility to Brecht's sexual preference and the ban on its practice in the Hartmans' home. The prosecutor also obtained a ruling from the trial court that if Brecht called his probation officer in Wisconsin to testify that Brecht lacks a violent disposition, the state could offer into evidence Brecht's conviction for passing worthless checks. Brecht elected not to call the probation officer.

The Court of Appeals of Wisconsin reversed Brecht's conviction. *State v. Brecht*, 138 Wis.2d 158, 405 N.W.2d 718 (1987). It gave three reasons: first, that the prosecutor's use of Brecht's silence violated both the self-incrimination clauses of the state and federal Constitutions and the due process clause of the federal Constitution; second, that the references to Brecht's homosexuality were unduly prejudicial because the prosecutor was not able to show that Roger Hartman communicated antipathy explicitly to Brecht; third, that the court's ruling on the motion *in limine* was wrong because worthless checks do not establish a propensity for violence. The court concluded that these errors were not harmless.

The Supreme Court of Wisconsin reversed in turn, unanimously reinstating the conviction. 143 Wis.2d 297, 421 N.W.2d 96 (1988). Relying on *State v. Sorenson*, 143 Wis.2d 226, 421 N.W.2d 77 (1988), the court rebuffed all claims under the self-incrimination clause of the state constitution, just as *Jenkins v. Anderson*, 447 U.S. 231, 235–39, 100 S.Ct. 2124, 2127–30, 65 L.Ed.2d 86 (1980), had held that use of silence to impeach a testifying defendant does not violate the self-incrimination clause of the federal Bill of Rights. Turning to the due process inquiry, the court observed that prosecutors may use as impeachment silence preceding the delivery of the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). See *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982). Nothing in the record implies that Brecht was told, until his arraignment, that he had a right to remain silent. It follows, from *Jenkins* and *Fletcher*, the court held, that the prosecutor could impeach Brecht's testimony at trial by observing that he did not tell anyone before his arraignment the story he told on the stand at trial. Silence at and after the arraignment was another matter under *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the court thought, because advice that you have a right to be silent implies that silence may not be used against you. Twice the prosecutor asked Brecht whether he told anyone at *any* time before trial that the shooting was accidental; twice the prosecutor remarked in closing argument that Brecht told no one; these four references, the court thought, invited the jury to draw an adverse inference from post-arraignment silence and thus violated the rule established in *Doyle*.

This did not avail Brecht, however, because the court deemed four references in a four-day trial to be peripheral; the error, the court held, was harmless beyond a reasonable doubt. Error in the ruling on the motion *in limine* the court put into the same category. As for the evidence of Brecht's homosexuality: the court held this no error at all. Although Molly Hartman testified that her husband had not "openly express[ed]" his disapproval of homosexuality to Brecht, and that there had been no set-to, she also testified that her husband

"didn't want a brother-in-law who was a homosexual." (The district court's opinion reproduces this part of her testimony, 759 F.Supp. at 505.) The Supreme Court of Wisconsin concluded that Roger Hartman's "disapproval was conveyed to Brecht by the restrictions Hartman and his wife imposed on Brecht while he lived in their home. These restrictions included that Brecht was to refrain from homosexual conduct and from inviting homosexual friends to the Hartman home. Thus, it is not unreasonable to infer that Brecht's homosexuality, which prompted restrictions on his lifestyle, could furnish a motive for the shooting." 143 Wis.2d at 321, 421 N.W.2d at 105.

The district court continued this game of Ping-Pong by issuing a writ of habeas corpus. Chief Judge Crabb agreed with the Court of Appeals of Wisconsin on all issues: she concluded that the comments on Brecht's silence violated the due process clause, that the evidentiary rulings were erroneous, and that none of the errors is harmless beyond a reasonable doubt. We summarize only her grounds of disagreement with the Supreme Court of Wisconsin.

Concerning evidence of homosexuality, the district judge wrote: "Discussing a person's sexual preference and setting restrictions on that person's behavior while staying in one's home are not equivalent to communicating disapproval or condemnation to that person." 759 F.Supp. at 509. The references to Brecht's homosexuality therefore were irrelevant, and, given the subject matter, prejudicial.

Disagreement on whether the references to post-arraignment silence were harmless was driven largely by the different questions the courts asked. The Supreme Court of Wisconsin asked whether these four references added substantial force to the many proper references to pre-arraignment silence and the lies Brecht told to the police; it concluded that the incremental effect was small. The district court, by contrast, asked whether the evidence against Brecht was irrefutable, stating that "the Court of Appeals for the Seventh Circuit requires that the other evidence of guilt be 'overwhelming' before concluding that a constitutional error was harmless." 759 F.Supp. at 508. It then concluded that the evidence against Brecht is less than overwhelming: there was no apparent motive, and the flight may have been inspired by panic rather than a desire to escape. The court wrote that the evidence about the trajectory of the bullet "may be inconsistent with [Brecht's] claim that the shooting was an accident, but it is not conclusive." 759 F.Supp. at 508.

The district court ordered Brecht released unless retried within 60 days. We stayed this order and now become the fourth court in sequence to disagree with its immediate predecessor.

II

[1] This case is here under 28 U.S.C. § 2254(a), which says that a court shall entertain a petition for habeas corpus "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." "A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 875, 79 L.Ed.2d 29 (1984). See also, e.g., *Lewis v. Jeffers*, — U.S. —, 110 S.Ct. 3092, 3102, 111 L.Ed.2d 606 (1990); *Smith v. Phillips*, 455 U.S. 209, 221, 102 S.Ct. 940, 948, 71 L.Ed.2d 78 (1982); *Rose v. Hodges*, 423 U.S. 19, 22, 96 S.Ct. 175, 177, 46 L.Ed.2d 162 (1975); *Bates v. McCaughtry*, 934 F.2d 99 (7th Cir.1991); *Bell v. Duckworth*, 861 F.2d 169 (7th Cir. 1988); *Jones v. Thieret*, 846 F.2d 457 (7th Cir.1988). Whether the probative force of Brecht's homosexuality exceeded its potential for improper use, and whether the prosecutor may put a defendant's prior convictions before the jury, are staples in the law of evidence. Errors in admitting or excluding evidence do not violate the Constitution unless the trial as a whole is so infected that the verdict is no longer reliable. *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *Lisenba v. California*, 314 U.S. 219, 228, 62 S.Ct. 280, 286, 86 L.Ed. 166 (1941). But see *McGuire v. Estelle*, 902 F.2d 749 (9th Cir.1990), re-

hearing denied, 919 F.2d 578 (1990), cert. granted, — U.S —, 111 S.Ct. 1071, 112 L.Ed.2d 1177 (1991). The district court did not ask whether Wisconsin conducted a trial that was, all things considered, adequate to sift guilt from innocence; it asked instead whether there were errors, and whether these were harmless beyond a reasonable doubt. Given *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), and *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), not to mention *Cupp* and *Lisenba*, that is the wrong approach.

[2] Even taking the subjects in isolation, as the district judge did, does not call into question the validity of the state's judgment. Whether the Hartmans' interdict on homosexual acts and homosexual friends at their home conveyed to Brecht Roger Hartman's reprehension of his sexual preference, and thus perhaps engendered Brecht's hostility, is a nice question of inference. A state may choose to give this question to a jury. The district judge substituted her assessment for that of the Supreme Court of Wisconsin: she did not say that its opinion is unreasoned or beyond the bounds of dispute; she simply disagreed. That is not an appropriate stance for a federal judge engaged in collateral review of a state conviction. "[R]espect for a state court's findings of fact and application of its own law counsels against the sort of *de novo* review undertaken" by the district court. *Lewis*, 110 S.Ct. at 3102.

United States v. Gillespie, 852 F.2d 475, 478–79 (9th Cir.1988), which the district court cited for the proposition that evidence of homosexuality is prejudicial, is another kettle of fish. In a federal prosecution for sexually molesting a three-year-old girl, the prosecution introduced evidence that the defendant had a homosexual relationship with his adoptive father, inviting the inference that anyone departing from the sexual norm is likely to violate little girls. There is no reason to think that homosexuals are likely to be pedophiles; the court properly thought the introduction of this evidence an abuse of discretion under Fed.R.Evid. 404(b). *Gillespie* was not a constitutional decision, and the use made of homosexuality in that case bears no resemblance to its use in this one.

[3] Now for the trial court's ruling that if the probation officer testified, the prosecution could use Brecht's bad-check convictions in cross-examination. The Supreme Court of Wisconsin has determined authoritatively that the court erred under state law. It does not follow that Wisconsin has violated the Constitution of the United States. The district court did not adduce any authority for its conclusion. Brecht's brief in this court likewise offers no authority, although he does try to distinguish *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948), the state's principal case.

Had the identical subject arisen in federal court, there would have been no reversible error, period. *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984), holds that a defendant who wishes to contest a ruling allowing the use of a conviction in cross-examination must present the testimony and endure the cross-examination. Otherwise, the Court concluded, it is impossible to put in context the use made of the conviction and to evaluate a claim of prejudice. Just so here. We have no idea—since the probation officer did not testify, and the convictions were never laid before the jury—how they would have been used, and with what effect, if any, on the trial. We also do not know how valuable was the testimony foregone.

It is, at all events, difficult to accept the idea that the Constitution forbids a state to inform the jury of a defendant's prior convictions. Brecht testified, and a federal jury normally learns of a testifying defendant's crimes. Fed.R.Evid. 609(a). Wisconsin does things differently, which may account for the prosecutor's effort to introduce the convictions when examining the probation officer, but this difference hardly makes anathema of the knowledge. Especially not when the witness was going to be the defendant's *probation officer*; it does seem apt to ask such a person what crime the defendant was on probation for. The jury knew from the circumstances of Brecht's presence in the Hartman home that Brecht was a convicted felon; learning that the felony was writing bad checks (as opposed to, say, mayhem or selling drugs) is an unlikely prospect for constitutional error in a murder case. We turn, then, to the prosecutor's comment on Brecht's failure to say at any time before trial that the shooting was a mishap.

III

[4] "Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative." *Jenkins*, 447 U.S. at 239, 100 S.Ct. at 2129 (citations omitted). If Brecht indeed shot Roger Hartman by accident, he had every reason to tell the police early and often. How else was he to win release from prison—or to ensure that investigators preserved evidence that would support his version of events? Why would an innocent man keep his sister in the dark about the circumstances of her husband's death? Would he not at least apologize for the accident? Silence supports an inference that it took Brecht a while to cook up a story. Fabricated defenses are best withheld until after the state has rested, not only to catch the opposition off guard but also to avoid any blatant inconsistencies with the facts the prosecution adduces.

But for *Doyle v. Ohio*, the prosecutor would have been entitled to ask the questions and argue the case precisely as he did. *Doyle* holds that however natural the inference from silence may be, the prosecutor may not undermine the implications of the *Miranda* warnings. A suspect told that he has a right to remain silent, *Doyle* concluded, may not be bushwhacked by an argument that silence implies guilt. *Fletcher* establishes that *Doyle* applies exclusively to silence after the suspect has been informed about the privilege of silence. Nothing in this record implies that Brecht received such advice before his arraignment. Thus, as the Supreme Court of Wisconsin held, questions and arguments about silence before arraignment are proper, while the questions and remarks in closing argument concerning whether Brecht told his story "at any time" before trial stand condemned by *Doyle*, for they referred in part to post-warning silence. Our question is whether the error was harmless.

A

[5, 6] Whether the error was harmless depends, for reasons discussed later, on what kind of entitlement *Doyle* establishes. Does *Doyle* implement a part of the Bill of Rights, or is it instead a constitutional prophylaxis?

One possibility is that comment on silence violates the self-incrimination clause of the fifth amendment, applied to the states by the fourteenth. No state may compel a person to incriminate himself, which sets up an argument that an inference from silence is a form of compulsion to speak. The defendant made just such an argument in *Jenkins*, and the Court rejected it—at least when the accused testifies, as Brecht did. 447 U.S. at 235–39, 100 S.Ct. at 2127–30. The privilege against compulsory self-incrimination may be waived. *Raffel v. United States*, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054 (1926), holds that a defendant who takes the stand waives the privilege to the extent of authorizing questions and comments along the line: Why didn't you tell this story earlier? Raffel testified at his second trial after keeping mum at the first. *Jenkins* holds that *Raffel* is equally applicable when the silence precedes trial. Justice Stevens, concurring in *Jenkins*, doubted the vitality of *Raffel* (treating testimony as a "waiver" is strained) but concluded that comment on silence is not *compulsion* to speak, so there is no privilege to waive. 447 U.S. at 241–45, 100 S.Ct. at 2130–33. One way or the other, *Jenkins* shows that what happened at Brecht's trial did not violate the self-incrimination clause.

Doyle suggests a different rationale: Comment on silence threatens the conviction of the innocent, and thus violates the due process clause. The Court remarked that "every post-arrest silence is insolubly ambiguous", 426 U.S. at 617, 96 S.Ct. at 2244, because the suspect may be exercising his constitutional right to silence. This theme came from *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975), in which the Court found post-arrest silence too ambiguous to be an appropriate basis of inferences in federal trials. Yet if the suspect was exercising his right to silence, he could explain as much to the jury and so defuse the prosecutor's argument. That silence can carry multiple messages does not make the ambiguity *insoluble*. Few pieces of evidence standing alone support confident conclusions. Trial is an occasion for the cumulation of evidence so that one strand may illuminate another. *Bourjaily v. United States*, 483 U.S. 171, 179–80, 107 S.Ct. 2775, 2780–81, 97 L.Ed.2d 144 (1987); *United States v. Martinez de Ortiz*, 907 F.2d 629, 633 (7th Cir.1990) (in banc).

In the years since *Doyle* the Court has thought better of its suggestion that no argument from silence may be presented to a jury. *Jenkins* allowed a prosecutor to urge inferences from pre-arrest silence, remarking that ambiguity "is a question of state evidentiary law." 447 U.S. at 239 n. 5, 100 S.Ct. at 2130 n. 5. *Fletcher* extended this treatment to post-arrest silence by suspects who did not receive *Miranda* warnings. Although one could have said that most suspects know of their privilege to remain silent whether or not the police tell them, and that this knowledge creates the same ambiguity mentioned in *Doyle*, the Court held that difficulties of inference are subjects for state law. *Fletcher* limited the ambiguity rationale of *Doyle* to federal cases, observing that states may draw such inferences as their domestic law permits unless the trial as a whole is fundamentally flawed. 455 U.S. at 604–05, 102 S.Ct. at 1310–11. *South Dakota v. Neville*, 459 U.S. 553, 564–66, 103 S.Ct. 916, 922–24, 74 L.Ed.2d 748 (1983), reinforced this conclusion in holding that a state may draw adverse inferences from a driver's refusal to allow a blood-alcohol test. Then *Wainwright v. Greenfield*, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), put the icing on the cake by holding that states may not draw even well-justified inferences from post-warning silence. The prosecutor tried to distinguish *Doyle* by observing that the silence in Greenfield's case was not ambiguous, to which the Court replied that probativeness is irrelevant. 474 U.S. at 293–94 & n. 12, 106 S.Ct. at 639–40 & n. 12. The reference to ambiguity in *Doyle*, the Court now observed, just "added weight", *id.* at 294, 106 S.Ct. at 640, to the opinion's real foundation—the desire to prevent the state from undercutting the value of the *Miranda* warnings. *Doyle* itself said as much, 426 U.S. at 617–18 n. 8, 96 S.Ct. at 2244–45 n. 8, when responding to the dissent of Justice Stevens, who wrote for the Court in *Greenfield*.

Justice White first offered the anti-mousetrapping ground in a brief opinion concurring in *Hale*, 422 U.S. at 182–83, 95 S.Ct. at 2139–40. *Doyle* and all of the opinions in its wake have quoted and adopted this view as the Court's. *Doyle* put it this way:

> [W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

426 U.S. at 618, 96 S.Ct. at 2245. *Jenkins*, which allows reference to pre-arrest silence, and *Fletcher*, which allows reference to post-arrest silence if the officers neglected to give *Miranda* warnings, emphasize that the state did not afford—and therefore could not renege on—any assurance that silence is costless. Cf. *Anderson v. Charles*, 447 U.S. 404, 408, 100 S.Ct. 2180, 2182, 65 L.Ed.2d 222 (1980) ("*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent."). *Greenfield* reinforces this understanding in the course of explaining, 474 U.S. at 292–94, 106 S.Ct. at 639–40, that even reliable inferences from silence are forbidden because they amount to governmental self-contradiction.

Doyle thus rests on a single proposition: Having implied when giving warnings that silence is safe, the government may not reverse course at trial. The rule of *Doyle* reduces the chance that *Miranda* warnings will injure the persons they are supposed to protect. *Doyle* makes the world safe for *Miranda*. But the warnings required by *Miranda* are not themselves part of the Constitution. They are designed to inform the suspects of their entitlements and so reduce the likelihood of subtle coercion of people in custody. *Oregon v. Elstad*, 470 U.S. 298, 304–09, 105 S.Ct. 1285, 1290–93, 84 L.Ed.2d 222 (1985); *New York v. Quarles*, 467 U.S. 649, 654, 104 S.Ct. 2626, 2630, 81 L.Ed.2d 550 (1984); *Michigan v. Tucker*, 417 U.S. 433, 442–46, 94 S.Ct. 2357, 2362–65, 41 L.Ed.2d 182 (1974). *Doyle* is therefore a prophylactic rule designed to protect another prophylactic rule from erosion or misuse. It has nothing to do with the defendant's guilt and everything to do with insisting that the government play straight with those it prosecutes.

B

Whether the prosecution's violation of *Doyle*'s rule in Brecht's case is harmless beyond a reasonable doubt is a question about which reasonable persons can disagree—have disagreed. The district judge and the three judges of the state's appellate court believe that the error was not harmless under this standard. Six justices of the Supreme Court of Wisconsin reached the contrary conclusion. (The seventh, Justice Ceci, did not participate in the decision.) The district judge thought her inability to deem the evidence "overwhelming" dispositive on the question. Some opinions of this court support such a perspective. E.g., *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1020 (7th Cir.1987); *Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir. 1988). "Beyond a reasonable doubt" is an exacting standard. See *Yates v. Evatt*, — U.S. —, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991); *Arizona v. Fulminante*, — U.S. —, 111 S.Ct. 1246, 1257–61, 113 L.Ed.2d 302 (1991). The state, by contrast, submits that errors are harmless when their marginal effect is slight even though the evidence leaves room for debate. This position, too, has some support in our decisions. E.g., *Phelps v. Duckworth*, 772 F.2d 1410, 1413–15 (7th Cir.1985) (in banc); *Fencl v. Abrahamson*, 841 F.2d 760, 769 (7th Cir. 1988).

We could trudge through the record and add to the score, making the count anywhere from 9–4 for harmlessness (if we should agree with the Supreme Court of Wisconsin) to 7–6 for the opposite conclusion. The antecedent question, however, is whether collateral review of state convictions in federal court is nothing more than a replay of the direct appeal, as one federal district judge and then three federal appellate judges duplicate the work of the more numerous state judges. Although arguing that duplication of effort should end in its favor, Wisconsin also urges us to revisit the question whether a federal court should apply the "reasonable doubt" standard, derived from *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), on collateral review of *Doyle* violations. *United States ex rel. Miller v. Greer*, 789 F.2d 438 (7th Cir.1986) (in banc), used the reasonable doubt test, but the Supreme Court reversed our judgment on other grounds under the name *Greer v. Miller*, 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987), and so deprived our opinion of authority. The Court granted certiorari to identify the proper standard on collateral attack but did not reach the issue because, it held, there had been no error in the first place. *Id.* at 761 n. 3, 765 n. 6, 107 S.Ct. at 3106 n. 3, 3108 n. 6. Justice Stevens, who alone considered the question on which review had been granted, concluded that a distinct standard of harmlessness applies on collateral review. *Id.* at 767–69, 107 S.Ct. at 3109–11 (concurring opinion). Two other Justices have cit-

ed that opinion with approval. *Duckworth v. Eagan*, 492 U.S. 195, 212, 109 S.Ct. 2875, 2884, 106 L.Ed.2d 166 (1989) (O'Connor & Scalia, JJ., concurring). No Justice has taken a contrary view.

Not long ago a majority of this court treated the question as open. In *Hunter v. Clark*, 934 F.2d 856 (7th Cir.1991) (in banc), two judges concluded that the reasonable doubt standard should not be employed in the collateral enforcement of prophylactic rules. *Id.* at 865–66 (concurring opinion). Four other judges called the concurring opinion "persuasive" and remarked that it "may well be correct" but found it unnecessary to essay a final decision. *Id.* at 859 n. 1 (plurality opinion). The other five members of this court did not discuss the question. See also *Hanrahan v. Greer*, 896 F.2d 241, 244–45 (7th Cir.1990) (calling question open but avoiding resolution because argument had not been preserved in district court); *Fencl*, 841 F.2d at 766–67 n. 6 (flagging question but avoiding resolution). Judges of this court have been bandying the subject about for six years, ever since *Phelps* was decided in September 1985. Although *Savory*, 832 F.2d at 1016–17 & n. 2, reiterated the approach of *Miller*, subsequent developments, especially the reservation in *Hunter*, permit renewed attention. No interest of the judicial system (or the parties) would be served by postponing yet again resolution of a question the Supreme Court thought cert-worthy in 1987. The State has asked us to apply the standard of *United States v. Lane*, 474 U.S. 438, 449, 106 S.Ct. 725, 732, 88 L.Ed.2d 814 (1986), and *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946), under which only an error that exerts substantial influence on the course of the trial and produces actual prejudice to the accused vitiates the judgment. By ignoring this request, Brecht has forfeited any possibility that the state neglected to preserve the claim in the district court. (The defendant made a vigorous waiver argument in *Hanrahan*, quite unlike Brecht's strategy. We do not know whether Wisconsin made this argument to the district judge and shall not endeavor to find out.)

The standard of "harmlessness" has never been a unitary one. Contrast *Lane* with *Chapman*. It varies with the nature of the underlying right, the tools available to correct the violation at trial, and the number of layers of review. *Chapman* establishes that the standard an appellate court should employ on direct review is whether the error is harmless beyond a reasonable doubt. Does this carry over to collateral attack? The Supreme Court has never addressed that question.

We know from *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), that § 2254 does not require federal courts on collateral attack to employ for every constitutional claim the same standards state courts must use. *Stone* holds that when a defendant invokes the exclusionary rule that has been devised to implement the fourth amendment, a federal court should inquire only whether the state gave the defendant a full and fair opportunity to litigate the claim. Error in application does not support a writ of habeas corpus. *Stone* observed that the exclusionary rule is an extra-constitutional device that helps motivate adherence to the fourth amendment, but that exclusion is not itself compelled by the Constitution. See also, e.g., *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); cf. Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv.L.Rev. 1 (1975). It followed, the Court held, that federal courts engaged in collateral review need not replicate the efforts of the judges of the state tribunals; it is enough to ensure that states adjudicate these claims. It may well be that the Court will establish a similar system for claims under *Miranda*, which like the exclusionary rule depends on prudential rather than textual or historical support. Justice O'Connor (joined by Justice Scalia) so argued in *Eagan*, 492 U.S. at 205–14, 109 S.Ct. at 2881–86, and the majority left the issue open. 492 U.S. at 201 n. 3, 109 S.Ct. at 2879 n. 3. If *Miranda* ultimately joins the exclusionary rule, claims under *Doyle* are logical companions, for just as *Miranda* creates a buffer around the self-incrimination clause, so *Doyle* creates a buffer around *Miranda*.

Selecting a deferential standard by which to assess harmlessness is an alternative to confining collateral review as tightly as *Stone* does—an alternative that leaves the federal court with substantially greater power to ensure that the state court is taking seriously its obligation to enforce the substantive rules. It is a middle ground between federal review that duplicates the direct appeal and federal review that is, after the fashion of *Stone*, next to no review.

For most of this nation's history "next to none" was an accurate description of collateral review of state judgments. Section 14 of the Judiciary Act of 1789 gave the federal courts jurisdiction to issue writs only when persons were held in federal custody. 1 Stat. 81–82. In 1867 a Congress concerned about the behavior of states that had joined the Confederacy extended federal power to state prisoners. 14 Stat. 385–86. In 1867, as in 1789, the writ ran only to release persons held without authority—that is to say, without "jurisdiction." See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441, 463–69 (1963). One convicted by a tribunal with jurisdiction over subject-matter and person could obtain no collateral relief, however grievously the tribunal erred. Shortly after Congress extended federal power to state prisoners, the Supreme Court began pouring more into the vessel of "jurisdiction". In 1915 the Court equated a kangaroo court with lack of jurisdiction, *Frank v. Mangum*, 237 U.S. 309, 330–35, 35 S.Ct. 582, 588–90, 59 L.Ed. 969 (1915), and by 1942 the distinction between "no jurisdiction" and "grievous error" had eroded so substantially that the Court discarded the limitation. *Waley v. Johnston*, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed. 1302 (1942) (conviction based on coerced confession). Not for a further 11 years, however, did the Court first use collateral review as a supplement to direct appeal, re-deciding procedural questions (such as the validity of the indictment) already fully considered by the state court; until *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), it had been necessary to show an error of special gravity that undermined confidence in the verdict. That is to say, the device through which the Court expanded review beyond strictly jurisdictional claims was to equate omission of those procedures central to the protection of the innocent with the lack of jurisdiction.

If the fifteen years that followed *Brown* witnessed an extraordinary extension of federal review of state judgments, the fourteen years since *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), have experienced a movement in the other direction. *Sykes* held that forfeitures in state court also block review in federal court unless the defendant shows both external cause and prejudice—not simply that the error had an adverse effect, but that it could threaten the conviction of the innocent. Cf. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970). *Stone* effectively eliminated collateral review of claims under the fourth amendment. Recently the Court overruled *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), one of the milestones in the expansion of collateral review. *Coleman v. Thompson*, — U.S. —, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991) (observing that *Fay* "was based on a conception of federal/state relations that undervalued the importance of state procedural rules"). See also, e.g., *McCleskey v. Zant*, — U.S. —, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) (enlarging the doctrine of "abuse of the writ").

Today—as for most of our history—the Court puts considerations of finality and federalism at the forefront of any discussion of the scope of collateral review. One who seeks that review must justify the federal role; it is not enough to cry "Constitution!". There are many shades of constitutional rules; those that protect the accuracy of the fact-finding process receive the greatest protection; rules that may be found in the text (such as the self-incrimination clause), even though they promote values other than accurate resolution of

factual contests, receive greater protection than doctrines that courts have devised in the penumbras of constitutional rules. We deal with such a penumbral doctrine—one that until *Brown* would not have been open at all on collateral review.

In deciding how (even whether) a federal court should examine the state's decision concerning such a supplementary doctrine, we could recite themes of federalism and finality—but these are so trumpeted in recent opinions such as *McCleskey* and *Coleman* that repetition would be tendentious. See also, e.g., *Teague v. Lane*, 489 U.S. 288, 308-09, 109 S.Ct. 1060, 1073-74, 103 L.Ed.2d 334 (1989); *Kuhlmann v. Wilson*, 477 U.S. 436, 452-55, 106 S.Ct. 2616, 2626-28, 91 L.Ed.2d 364 (1986). One dominant theme is that doctrines protecting the innocent, and claims of actual innocence, receive special protection. See *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986) (the "cause and prejudice" preconditions to collateral review of claims forfeited in state court do not apply "where a constitutional violation has probably resulted in the conviction of one who is actually innocent."); *Kuhlmann*, 477 U.S. at 452-54, 106 S.Ct. at 2626-27 (showing of probable innocence is condition of second review of same issue). Three additional practical considerations stand out.

First, collateral review followed by a new trial means delay, often extended. Passage of time diminishes the courts' ability to resolve factual disagreements accurately. Trials long after the event, when memories have faded, are less likely to convict the guilty and acquit the innocent. Moreover, at a new trial there will be opportunities for new errors, which may be as bad as the error in Brecht's trial. Sometimes inaccuracy hurts the defendant, but more often it counts against the prosecution, which bears the burden of persuasion, and thus against the public interest in the accurate enforcement of the law. When the constitutional blunder diminished the accuracy of the factfinding process, then retrial even after many intervening years may make a just resolution more likely; when the constitutional entitlement is one that tolerates a reduction in accuracy (as does the self-incrimination clause) in pursuit of other objectives, again the costs of deferred trial may be worth bearing. When the rule neither promotes accuracy nor can be located in the Constitution itself—when the foundation of the doctrine is avowedly prudential—then courts must take into account all of the costs as well as the benefits. Delay makes it substantially more costly to enforce a prophylactic rule such as *Doyle* on collateral attack than on direct appeal, which implies a corresponding adjustment in doctrine. See Thomas W. Merrill, *The Common Law Powers of the Federal Courts*, 52 U.Chi.L.Rev. 1, 53 (1985).

Second, federal courts, knowing the high costs of ordering retrials many years after the events, may be inclined to dilute the standard of harmlessness while retaining the "reasonable doubt" formula, excusing errors that would not be tolerated on direct appeal. A careful reader of our opinions would find some traces of this. E.g., *Hanrahan v. Thieret*, 933 F.2d 1328, 1336 (7th Cir.1991). State courts reading these opinions then relax their own vigilance, an unhappy consequence that could be avoided by distinguishing the standards of harmlessness on direct and collateral review.

Third, while federal courts re-do the decisions already made by state courts, federal business languishes. Time to review closed cases may be had only at the expense of time to decide pending ones. Serving as super-appellate tribunals in the state system, federal courts necessarily devote less time to cases that have yet to receive an initial decision. Less time per case means an increased chance of error. It also means a longer queue, during which disputes fester and memories fade, impairing the federal courts' ability to resolve accurately cases pending on their primary dockets. In some federal districts civil trials have become exceptional events. There are many causes of this, but each contributes at the margin, and each segment of judicial business must justify its imposition on resources the judicial system cannot control or augment.

Selecting a standard for assessing harmless error, no less than deciding when the prosecutor can use evidence the Constitution says he should not have at all, requires an assessment of the marginal benefits and costs of enforcement. The difference between a *Chapman* standard of review on collateral attack and a *Kotteakos* standard is not likely to impair the enforcement of *Doyle*. Recall that *Kotteakos* supplies the standard—whether an error "had substantial and injurious effect or influence in determining the jury's verdict", 328 U.S. at 776, 66 S.Ct. at 1253; see also *Lane*, 474 U.S. at 449, 106 S.Ct. at 732—that federal courts use in evaluating claims that federal statutes and rules have been violated in federal trials. No one believes that it affords insufficient protection to these federal norms. Under any of the competing definitions, the substantive rule (and review under the most stringent standard in state court) informs prosecutors that an effort to draw the jury's attention to the defendant's silence reduces the chance of conviction, and tells trial judges how to respond to the prosecutors' efforts. These two messages, unaffected by the standard of harmless error, are the principal advantages of the rule. When the rule is as far removed from protecting the innocent as is *Doyle*, there is no need for the strict enforcement that the *Chapman* standard creates.

C

What we have said would be academic if Congress or the Supreme Court has directed the application of the *Chapman* standard on collateral review. But neither institution has done this. Congress has been silent on the standard of review. Indeed, with the exception of 28 U.S.C. § 2254(d), Congress has been silent on most procedural questions. See John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U.Chi.L.Rev. 679, 707-09 (1990). *Chapman* was a direct appeal, as are most of the other cases in which the Supreme Court applied the "reasonable doubt" standard to state convictions. That the standard of harmless error may vary between direct and collateral appeal is a commonplace. For example, a violation of Fed.R.Crim.P. 11, which establishes procedures for taking guilty pleas, is enforceable on direct appeal by almost automatic reversal. *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). On collateral attack, however, Rule 11 is enforceable only to the extent that the disregard of its provisions makes the proceedings fundamentally unfair. *United States v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979). The difference is not attributable to the nonconstitutional status of Rule 11, for the Rule is a "law," and the pertinent statute, 28 U.S.C. § 2255, allows collateral attack on the ground that a person is in custody "in violation of the Constitution or laws of the United States". See *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974). The change in the standard of review instead rests on the conclusion that one round of review is sufficient unless something has gone very wrong indeed. Collateral review is not supposed to be a replay of the direct appeal. *Sunal v. Large*, 332 U.S. 174, 181-82, 67 S.Ct. 1588, 1592-93, 91 L.Ed. 1982 (1947), a point emphasized when the Court held in *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), that blunders that could support reversal as "plain error" on direct appeal do not support collateral relief.

The same may be said for review of state convictions. See *Henderson v. Kibbe*, 431 U.S. 145, 154 & n. 13, 97 S.Ct. 1730, 1737 & n. 13, 52 L.Ed.2d 203 (1977), which holds that only in the rarest of cases will an instruction to which no objection was made at trial support collateral attack, even though the same instruction might have been "plain error" on direct appeal. Ordinary trial errors (even constitutional ones) that might lead to reversal on appeal do not support collateral review in federal court unless the trial as a whole has miscarried, impugning the accuracy of the judgment. See, e.g., *Darden*, *Donnelly*, *Cupp*, and *Lisenba*. Expressions throughout the *Doyle* line imply that the Court believes these cases salient. E.g., *Fletcher*, 455

U.S. at 605, 102 S.Ct. at 1311 (citing *Cupp* for the proposition that the ambiguity of silence supports a new trial only when it degrades the accuracy of the fact-finding apparatus); *Miller*, 483 U.S. at 765–67, 107 S.Ct. at 3108–10 (applying the *Donnelly* approach to determine whether a prosecutor's efforts to argue inferences from silence violate *Doyle* at all).

So far as we can tell, only twice has the Supreme Court used the *Chapman* standard on collateral attack. The first time, *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), the central question was whether an unconstitutional burden-shifting instruction *ever* could be harmless error. The Court held that it may be deemed harmless under the *Chapman* standard. The second time, *Yates v. Evatt*, required the Court to refine its holding in *Rose*, which was not entirely consistent in its explanation of *Chapman*. See 111 S.Ct. at 1892 & n. 8. *Yates* held that the Supreme Court of South Carolina erred in withholding collateral relief when it employed a standard of harmlessness at variance with *Chapman*'s. *Yates* illustrates the value of the *Chapman* standard when the constitutional rule is designed to protect the innocent from wrongful conviction. South Carolina's trial court had charged the jury in a murder case not only that malice could be presumed from the use of a deadly weapon but also that malice could be presumed when the death occurs in the course of an unlawful act. Both of these presumptions had been declared unconstitutional because they allowed the state to evade its burden of proving guilt beyond a reasonable doubt. See *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The state court, on remand from *Yates v. Aiken*, proceeded to misstate the facts and all but thumb its nose at the opinion reversing it. (It had earlier denied relief to Yates without even citing the federal cases—and this despite a remand by the Supreme Court with instructions to apply *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). See 111 S.Ct. at 1890.) So the Supreme Court again granted review and reversed, explicating the meaning of *Chapman* in burden-shifting cases.

Yates v. Evatt presents a striking contrast with our case. First, *Yates* dealt with constitutional rules designed to protect the innocent. Such rules give the strongest justification for independent federal review. *Doyle* is a penumbral rule. Second, *Yates* addressed a state court apparently unwilling to accept the federal norm; Wisconsin, by contrast, has applied *Doyle* conscientiously. Federal courts should discourage recalcitrance and reward full consideration—which they cannot if they review every constitutional claim from scratch. *Yates* reinforces rather than shakes our conviction that the "reasonable doubt" standard, compelling the state to justify the judgment with the same burden it bears before the jury in the first instance, is out of place in the collateral enforcement of prophylactic rules.

D

[7] We hold that the standard of harmlessness on collateral enforcement of prophylactic rules is the one stated in *Kotteakos* and *Lane*—whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 776, 66 S.Ct. at 1253; see also *Lane*, 474 U.S. at 449, 106 S.Ct. at 732. The Court added in *Kotteakos* that "if one is left in grave doubt, the conviction cannot stand." 328 U.S. at 765, 66 S.Ct. at 1248. This amply protects the federal interest—and the defendant's—in enforcing rules that are unrelated to the protection of the innocent.

We recognize that *Bass v. Nix*, 909 F.2d 297, 304-05 & n. 14 (8th Cir.1990), has elected not to apply the *Kotteakos-Lane* approach to collateral review of *Doyle* errors. *Bass* is founded on a belief that the "insoluble ambiguity" language of *Doyle*, which is directed to the protection of the innocent, still represents the Supreme Court's view. As we have shown, it does not; today the probative value of inferences from silence is a question of state law. Because *Bass* rests on a misunderstanding of the justification of the *Doyle* rule, we respectfully decline to follow it.*

Application of our approach is straightforward. Brecht does not contend that the four references to his post-arraignment silence had "substantial and injurious effect" and could not do so with a straight face, given the many more, and entirely proper, references to his silence preceding arraignment. Brecht's sole submission, tracking the district court's conclusion, is that once any constitutional error has occurred, the judgment must be set aside unless the evidence is "overwhelming", which Brecht submits it is not. As we have rejected that approach, we conclude that the violation of *Doyle* does not support a writ of habeas corpus.

REVERSED

CUDAHY, Circuit Judge, concurring in the judgment.

I concur in the judgment.

The majority opinion pursues with considerable eloquence and skill a subject in which its author has evinced a burning interest for a number of years. *Cf. United States ex rel. Miller v. Greer*, 789 F.2d 438, 448 (7th Cir.1986) (in banc) (Easterbrook, J., dissenting), *rev'd on other grounds*, 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); *Hunter v. Clark*, 934 F.2d 856, 865 (7th Cir.1991) (in banc) (Easterbrook, J., concurring).

In *Hunter*, our most recent in banc encounter with the problem of the standard for harmless constitutional error in collateral review, Judge Easterbrook was joined only by Judge Posner.

Judge Eschbach's statement in *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1016–17 (7th Cir.1987), still accurately states Seventh Circuit law:

> With respect to the admission of statements petitioner made to police without the benefit of the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the standard for harmless error need not detain us long. Errors of constitutional magnitude are grounds for reversal unless they are "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *see also, e.g., United States ex rel. Miller v. Greer*, 789 F.2d 438 (7th Cir.1986) (en banc), *rev'd on other grounds*, 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); *see also United States ex rel. Allen v. Franzen*, 659 F.2d 745, 748 (7th Cir.1981). While the state suggests that perhaps some other standard is appropriate to habeas corpus actions, the law in this circuit is plainly otherwise. Although the Supreme Court was presented with an opportunity to resolve this issue in *Miller*, it found it unnecessary to reach the issue, holding instead that there had been no constitutional violation at all. Accordingly, the "harmless beyond a reasonable doubt" standard remains the law in this circuit, even where the errors are challenged on collateral review.

Judge Wood in *Hanrahan v. Thieret*, 933 F.2d 1328, 1336, 1337 n. 17 (7th Cir. 1991), endorses the same general position:

> Constitutional error does not require automatic reversal. On the contrary, an otherwise valid conviction need not be set aside if the error is harmless. As the district court correctly stated, however, the standard is strict indeed. A court must be able to say confidently on the record that the error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828; *United States v. Hill*, 898 F.2d 72, 75 (7th Cir. 1990).

The same opinion continues, "The Supreme Court has yet to overrule or formally modify *Chapman* . . . and we must continue to respect its holding until that day." *Id.* at 1337 n. 17.

* Because this opinion creates a conflict among the circuits and changes the standard used in this circuit, it was circulated before release to all judges in active service. See Circuit Rule 40(f). A majority did not favor hearing in banc. Chief Judge Bauer and Judges Wood, Cudahy, Flaum, and Ripple voted to hear the case in banc.

[illegible] at 695, [illegible] S.Ct. at [illegible], citing *Cupp* [illegible] the proposition that [illegible] degrades the accuracy of the fact-finding apparatus); *Miller*, 483 U.S. at 765–67, 107 S.Ct. at 3108–10 (applying the *Donnelly* approach to determine whether a prosecutor's efforts to argue inferences from silence violate *Doyle* at all).

So far as we can tell, only twice has the Supreme Court used the *Chapman* standard on collateral attack. The first time, *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), the central question [illegible] instruction ever could be harmless [illegible] deemed harmless under the *Chapman* standard. The second time, *Yates v. Evatt*, requires the Court to refine its holding in *Rose*, which was not entirely consistent in its explanation of *Chapman*. See 111 S.Ct. [illegible] with *Chapman* states that the value of the *Chapman* standard [illegible] the constitutional rule is designed to protect the innocent from wrongful conviction. South Carolina's trial court had charged the [illegible] murder [illegible] only that [illegible]

[illegible] presumption had been declared unconstitutional, [illegible] they allowed the state to evade its burden of proving guilt beyond a reasonable doubt. See *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The state court, on remand from *Yates v. Aiken*, proceeded to misstate the facts and all but thumb its nose at [illegible] in reversing it. (It had earlier [illegible]

(1985). See [illegible] 1890). So the [illegible] ded review and [illegible] aning of *Chapman* in burden-shifting cases.

Yates v. Evatt presents a striking contrast with our case. First, *Yates* dealt with constitutional rules designed to protect the innocent. Such rules give the strongest justification for independent federal review. *Doyle* is a [illegible] al rule. Second, [illegible] addressed [illegible] court apparently [illegible], to accept [illegible] deral norm; Wisconsin, by contrast, [illegible] applied *Doyle* consistently. [illegible] rts should disregard [illegible] reward full consideration [illegible] which [illegible] annot if they recognize [illegible] every constitutional claim from *Yates* [illegible] rather than [illegible] the "reasonable doubt" standard, [illegible] ng the state to [illegible] the same burden [illegible] the first instance in the collateral [illegible] lactic rules.

[illegible] tandard of harmless [illegible] orcement of prophylactic rules [illegible] ested in *Kotteakos* and *Lane*—whether [illegible] the error "had substantial and injurious effect or influence in [illegible] jury's verdict." [illegible] 96 S.Ct. at [illegible] at 449, 106 [illegible] ined in *Kotteakos* [illegible] ave doubt, the [illegible] U.S. at 765, [illegible] protects the federal interest [illegible] fendant's—in enforcing rules [illegible] related to the protection of the [illegible]

We recently [illegible] *Nix*, 909 F.2d [illegible] (7th Cir.1990), has [illegible] not to apply [illegible] *Kotteakos-Lane* approach [illegible] collateral [illegible] of *Doyle* errors. [illegible] founded [illegible] belief that the [illegible] age of *Doyle* [illegible] tion of the Supreme [illegible] it. It does [illegible] al inference [illegible] state law

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[illegible] 2d 694 (1966), the [illegible] s error need not de[illegible] rs of constitutional [illegible] ds for reversal un[illegible] ss beyond a reason[illegible] *man v. California*, [illegible] 824, 17 L.Ed.2d 705 [illegible] *United States ex* [illegible] 789 F.2d 438 (7th [illegible] *rev'd on other* [illegible], 107 S.Ct. 3102, 97 [illegible] *see also United* [illegible] *Franzen*, 659 F.2d [illegible]). While the state [illegible] s some other stan[illegible] habeas corpus ac[illegible] circuit is plainly [illegible] the Supreme Court [illegible] an opportunity to [illegible] *Miller*, it found it [illegible] the issue, holding [illegible] been no constitu[illegible] Accordingly, the [illegible] reasonable doubt" [illegible] law in this circuit, [illegible] are challenged on

[illegible] *ahan v. Thieret*, [illegible] 17 n. 17 (7th Cir. [illegible] general position: [illegible] es not require au[illegible] the contrary, an [illegible] on need not be set [illegible] armless. As the [illegible] stated, however, [illegible] indeed. A court [illegible] nfidently on the [illegible] was harmless be[illegible] ubt. *Chapman*, [illegible] at 828; *United* [illegible] 72, 75 (7th Cir.

[illegible] s, "The Supreme [illegible] r formally modi[illegible] must continue to [illegible] at day." *Id.* at

[illegible] or hearing in banc. [illegible] es Wood, Cudahy, [illegible] hear the case in

Given this precedent, I do not believe—whatever its merits—that this is an open question.

Affirmed in part, vacated in part, and remanded.

UNITED STATES of America, Plaintiff-Appellee,

v.

William BROWN, Danny Brown, Scot Burkhead, Randall Sorrells, and Brian Hollenback, Defendants-Appellants.

Nos. 90-2382, 90-2414, 90-2478, 90-2752 and 90-3179.

United States Court of Appeals, Seventh Circuit.

Argued May 13, 1991.

Decided Sept. 30, 1991.

Rehearing Denied Nov. 22, 1991.

Convictions were obtained in the United States District Court for the Central District of Illinois, Michael M. Mihm, J., for conspiracy to distribute marijuana, money laundering, tax evasion, and conspiracy to impede Internal Revenue Service (IRS) investigation. Defendants appealed. The Court of Appeals, Flaum, Circuit Judge, held that: (1) defendant's status as middleman or distributor of marijuana could not alone support finding that defendant was "supervisor," "manager," or "leader" subject to increase in base offense level; (2) manager in marijuana distribution scheme did not become organizer or leader subject to four-level increase in base offense level when manager became ranking member of leader's organization in Illinois after leader moved to Arizona; and (3) giving proceeds of marijuana sales to another person "for safekeeping" after defendant was on notice of criminal investigation was "obstruction of justice" warranting two-point increase in base offense level.

1. Criminal Law ⇐1139, 1158(1)

Court of Appeals defers to sentencing court's factual findings and credibility determination unless they are without support in record; Court of Appeals does not decide factual issues de novo. 18 U.S.C.A. § 3742(d).

2. Criminal Law ⇐1251

Defendant's status as middleman or distributor of marijuana could not alone support finding that defendant was "supervisor," "manager," or "leader" subject to increase in offense level. U.S.S.G. § 3B1.1, 18 U.S.C.A.App.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐1251

Defendant who is middleman is not immune from application of sentencing guideline to increase offense level if defendant was organizer, leader, manager, or supervisor. U.S.S.G. § 3B1.1, 18 U.S.C.A.App.

4. Criminal Law ⇐1251

Manager in marijuana distribution scheme did not become organizer or leader subject to four-level increase in offense level when manager became ranking member of leader's organization in Illinois after leader moved to Arizona; manager did not assume any additional responsibilities in leader's absence. U.S.S.G. § 3B1.1, 18 U.S.C.A.App.

5. Criminal Law ⇐1253

Giving proceeds of marijuana sales, i.e., cash and securities, to another person "for safekeeping" after defendant was on notice of criminal investigation was "obstruction of justice" warranting two-level increase in offense level for conspiracy to distribute and money laundering. U.S.S.G. §§ 3C1.1, 3C1.1, comment. (n.3), 18 U.S.C.A.App.

See publication Words and Phrases for other judicial constructions and definitions.

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In The
Supreme Court of the United States
October Term, 1991

Todd A. Brecht,
Petitioner,

v.

Gordon A. Abrahamson,
Superintendent, Dodge Correctional Institution,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Todd A. Brecht, respectfully requests that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Wisconsin, *State v. Brecht*, 138 Wis. 2d 158, 405 N.W.2d 718 (Wis.App., 1987), reversing Petitioner's conviction, is reproduced in Appendix A (1a-7a).

The reported opinion of the Supreme Court of Wisconsin, *State v. Brecht*, 143 Wis. 2d, 421 N.W.2d 96 (Wis., 1988), reinstating Petitioner's conviction, is reproduced in Appendix B (1b-11b).

The reported opinion of the United States District Court for the Western District of Wisconsin, *Brecht v. Abrahamson*, 759 F. Supp. 500 (W.D. Wis. 1991), granting Petitioner a writ of habeas corpus, is reproduced in Appendix C (1c-11c).

The reported opinion of the United States Court of Appeals for the Seventh Circuit, *Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir. 1991), reversing the order of the District Court, is reproduced in Appendix D (1d-15d).

The unreported order of the United States Court of Appeals for the Seventh Circuit denying Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc on November 20, 1991, is reproduced in Appendix E.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit, reversing the grant to Petitioner of a writ of habeas corpus, was filed on September 26, 1991.

Petitioner's subsequent Motion for Rehearing and Suggestion for Rehearing En Banc was denied by the United States Court of Appeals for the Seventh Circuit on November 20, 1991.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rules 10(1)(a) and 10(1)(c) of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment V provides in pertinent part: "No person shall be... deprived of life, liberty, or property, without due process of law...."

The United States Constitution, Amendment XIV provides in pertinent part: "No State shall... deprive any person of life, liberty, or property, without due process of law..."

The United States Constitution, Amendment VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a... trial, by an impartial jury of the State and district wherein the crime shall have been committed..."

STATEMENT OF THE CASE

On October 18, 1985, Petitioner, Todd A. Brecht, was arrested by authorities from the Buffalo County, Wisconsin Sheriff's Department (D. 7, Ex. M, p. 358)[1]. Following his initial appearance and preliminary hearing, Petitioner was charged by information with one count of first-degree murder for the death of his brother-in-law Roger Hartman, the District Attorney for Buffalo County, Wisconsin. Id. at 10-11. Between March 11 and 14, 1986, Petitioner was tried for this offense before a jury in La Crosse, Wisconsin.

At trial Mr. Brecht testified that he had shot Roger Hartman but asserted that the incident was an accident. Id. at 6. During the course of the trial, the prosecutor made several references to Mr. Brecht's decision to remain silent after having been read his *Miranda* rights. The state's line of questioning focused on Mr. Brecht's testimony relative to his version of the shooting incident. During cross-examination of Mr. Brecht, the state confronted him in the following manner:

> Q - In fact the first time you have ever told this story is when you testified here today was it not?
>
> [Petitioner's counsel]: Objection your Honor.

---

[1] Unless otherwise indicated, all citations to facts contained in the Statement of the Case are made to Document No. 7, Exhibit No. M as labeled within the Transcript of Record on Appeal to the United States Court of Appeals for the Seventh Circuit. This particular document refers to the transcript of the March 11-14, 1986 trial of Petitioner in the Wisconsin Circuit Court of Buffalo County.

> The Court: No, I am going to allow him to answer the question.
>
> A You mean the story of actually what happened?
>
> Q Yes.
>
> A I knew what happened, I'm just telling it the way it happened, yes, I didn't have a chance to talk to anyone, I didn't want to call somebody on the phone and give up my rights, so I didn't want to talk about it, no sir. Id. at 677-682.

On re-cross examination, the state further addressed Mr. Brecht's pre-trial silence when the prosecutor inquired:

> Q Did you tell anyone about what had happened in Alma?
>
> A No I did not. Id. at 716.

During the state's closing argument, the prosecutor made the following further comments:

> ...and remember that Mr. Brecht never volunteered until in this courtroom what happened at the Hartman residence...
>
> ...he made no statements to the law enforcement officers...
>
> He sits back here and sees all of our evidence go in and then comes out with this crazy story that we're going to get into in some detail.
>
> He said he wanted to talk to the detectives. Well Polus and Papke (police officers) weren't good enough. Seven guys on the Buffalo County Sheriff's Department, two of them are there with a warrant and does he say anything? Mr. Ridgeway said, "what would you say?" I know what I'd say, I'd say "hold on, this was a mistake, this was an accident, let me tell you what happened", but he didn't say that did he. No he waited until he hears our story. Id. at 793, 801, 824, 879, 882, 888.

The prosecution also made several references during the course of the trial to Mr. Brecht's homosexual orientation. Id. at 392, 393, 400, 605, 613, 617-621. It was the prosecution's

intention to use Mr. Hartman's aversion to his brother-in-law's sexual orientation to establish a motive for his death. Id. at 71, 72. Yet at no point in the trial did the state produce evidence that Mr. Hartman ever related his personal bias to Mr. Brecht. In fact, Mr. Brecht's sister, Molly Hartman, testified that Roger never told Mr. Brecht that he found his sexual orientation distasteful. Id. at 419-422, 436. The jury found Petitioner guilty as charged, and a judgment of conviction was entered on March 14, 1986.

Petitioner appealed to the Wisconsin Court of Appeals which reversed his conviction, holding *inter alia* that prosecutorial references to Petitioner's pre-trial silence violated his right to a fair trial. *State v. Brecht*, 138 Wis.2d 158, 408 N.W.2d 718, 723 (Wis.App., 1987). The Court also found this prejudicial error magnified by erroneous evidentiary rulings made at the trial level. Id.

The Wisconsin Supreme Court reversed the decision of the Wisconsin Court of Appeals and reinstated Petitioner's conviction. *State v. Brecht*, 143 Wis.2d 297, 421 N.W.2d 96 (Wis. 1988). While finding error in the state's reference to Petitioner's post-*Miranda* silence, the Supreme Court held such error harmless. Id. at 421 N.W.2d 104. Similarly, The Wisconsin Supreme Court concluded that any erroneous evidentiary rulings made by the trial court were harmless. Id. at 106.

Petitioner then filed a Petition for a Writ of Habeas Corpus with the United States District Court for the Western District of

Wisconsin. The district court granted the petition for habeas relief. *Brecht v. Abrahamson*, 759 F.Supp. 500 (W.D.Wis., 1991). The district court held that the state's references at trial to the Petitioner's post-*Miranda* silence impermissibly infringed on his Fifth and Fourteenth Amendment Rights under the United States Constitution. Id. at 507. The error of the trial court in allowing such repeated references was held to be prejudicial under the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967). Id. at 508. The district court further held that the admission of evidence as to Petitioner's homosexuality as well as a trial court ruling that Petitioner could not offer testimonial evidence as to his non-violent character without opening the door to cross-examination regarding a past conviction were both constitutional errors of a prejudicial nature. Id. at 509.

Subsequent to the granting of the writ of habeas corpus by the district court, Respondent appealed to the United States Court of Appeals for the Seventh Circuit. A panel of the Court of Appeals (Easterbrook, Cudahy, Pell) ultimately reversed the grant of the writ. *Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir. 1991). The panel opinion, written by Judge Easterbrook, based its decision on two primary grounds.

First, the court held that the standard for reviewing a violation of *Doyle v. Ohio* was less than that articulated in *Chapman v. California*. Specifically, the court held that the prophylactic nature of Doyle, and the collateral nature of a

habeas corpus proceeding, relieved the prosecution from the duty to prove that its error was harmless beyond a reasonable doubt. Id. at 1375. The court held that the proper standard for reviewing these violations was that set forth in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239 (1946) and *United States v. Lane*, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986). This standard holds harmless all trial errors which do not, "exert substantial influence on the course of the trial and produce actual prejudice to the accused". Id. at 1375. Secondly, the court held that the admission of evidence relative to Mr. Brecht's homosexuality was a perceived error of state law not cognizable in a federal habeas corpus proceeding. Id. at 1367.

Petitioner's subsequent Motion for Rehearing and Suggestion for Rehearing En Banc was denied by the Seventh Circuit Court of Appeals on November 20, 1991.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case to address the conflict between the circuits established by the decision of the United States Court of Appeals for the Seventh Circuit which appears to conflict with precedent of this Court in *Chapman v. California*. Were the new standard permitted to stand, it is submitted that the standard implicates a Sixth Amendment

deprivation of the right to a jury trial.[2] The issue has been raised repeatedly by the various Courts of Appeal.

The proper application of the harmless error standard or any alternative standard is vitally important to the criminal justice system of the United States, both to direct appeal cases as well as collateral attack. In the end, the harmless error standard not only guarantees the right to due process but also guarantees in *Miranda* related cases, the Sixth Amendment jury trial right. By one 1980 estimate, the harmless error standard was involved in possibly as many as "ten percent of all criminal appeals during the last thirteen years." Stacy & Dayton, Rethinking Harmless Error, 88 Colum. L. Rev. 77, 81; citing Goldberg, Harmless Error: Constitutional Sneak Thief, 71 J. Crim. L. & Criminology 421 (1980). The harmless error standard is implicated routinely in review of criminal convictions.[3]

The ultimate issue presented by this case involves the appropriate decision maker (jury or judge(s)) in criminal cases when a constitutional error of law has been made at trial. If the error is "harmless constitutional error", that is tantamount to stating that the jury decision could not have been impacted by

---

[2] Indeed, at some point an issue of the suspension of the writ of habeas corpus may lie in the background.

[3] A February 11, 1992 Westlaw search of the Allfeds and Allstates databases found 5079 reported federal court cases involving harmless error since 1980 and 16,986 reported state cases since 1980 (or approximately 5 1/2 reported cases for every single day since January 1, 1981). A similar Lexis search in the Mega database found 27,765 reported state and federal cases. Note, however, not all of these cases involve constitutional harmless error.

the error. Such determinations require minimal substitution of judicial fact weighing for jury weighing of the same facts (as commanded by the constitutional mandate of the Sixth Amendment). However, once a court determines that something more than harmless error is involved, for the court to further weigh the impact of constitutional error, substitutes judicial fact weighing for jury fact weighing- in direct contravention of the Sixth Amendment right to a jury trial in criminal cases.

There is no reason to believe that judges are better qualified than juries to make "correct" decisions and inferences about facts. Indeed, as the Petition for Rehearing with Suggestion for Rehearing En Banc indicated (Appendix F), an additional, serious source of error is introduced by appellate courts attempting to reweigh facts, evaluation that in the instant case amounted to gross distortion of the facts as presented to the jury and as argued by the prosecutor.

There is, moreover, "(S)trong evidence demonstrating that appellate judges cannot and do not accurately gauge the impact that particular evidence had or would have had upon a particular jury that convicted the defendant." Stacy & Dayton, Rethinking Harmless Error, 88 Colum. L. Rev. 79, 129, n. 196 (1988), referring to Teitelbaum, Sutton-Barbere and Johnson, Impact of Improper Evidence Upon Juries, 1983 Wis. L. Rev. 1147.[4]

[4] Teitelbaum reports substantial disagreement as to the importance of improper testimony regarding the defendant's refusal to speak to a police officer after an accident: disagreement not only among laypersons but also reflected among lawyers (who were surrogates for judges). See, Teitelbaum, 1200-

Ultimately, the harmless error test reflects the Sixth Amendment right to jury trial. We should be cautious about evidence weighing by a judge "whose experience with the criminal justice system often breeds a cynicism and skepticism that contrasts sharply with the fresh open attitude of many jurors." Stacy, at 137. Permitting judges to weigh evidence "gives prosecutors an incentive to commit constitutional error." Id.[5] To permit appellate judges to engage in any weighing is to substitute their evaluation for constitutionally mandated jury evaluation of evidence.[6]

1201, Appendix 2, Tables 1 and 2, item 8, q. 14. at 1183, and also regarding the similarity of views of judges and lawyers see 1164. Teitelbaum considered the data demonstrating wide disparity among laypersons, significant lack of agreement among lawyers, and concluded, "For reviewing courts to conclude that a given item of proof, or a given argument did, or did not carry balance-tilting weight with a particular jury appears, therefore, to be a most speculative enterprise." (1183).

[5] Stacy suggests that the proper standard for constitutional error should require the court to conclude that the error did not, or a claimed right would not affect the outcome as a matter of law. Stacy, at 133.

[6] Moreover, it is appropriate to place the burden upon the states to demonstrate the harmlessness of constitutional error occasioned by prosecutorial misconduct. See Note, Harmless Error, Prosecutorial Misconduct and Due Process: There's More to Due Process then the Bottom Line, 1988 Colum. L. Rev. 1298 (1988). Such assignment of the burden is appropriate in that each of the policy reasons supporting Strickland v. Washington, 466 U.S. 668, 693 (1984) is absent (i.e. the government was not responsible for and thus unable to prevent ineffective assistance by defense counsel), the ordinary burden of proof rules place such burdens upon the state in criminal law cases, and the common law policy customarily assigns the duty to demonstrate impact upon the outcome upon the party who benefitted from the error. See, Note, Harmless Error, 1318-1320.

The issues presented by this case complement the issue raised by this Court's grant of certiorari in *West v. Wright*, 931 F.2d 262 (4th Cir.), cert.granted 112 S.Ct. 656, 60 U.S.L.W 3294, and cert. grant amended, 112 S.Ct. 672, 60 U.S.L.W. 3475 (1991). *West v. Wright* raises the proper role of federal courts in reviewing fact determinations involving claims of insufficient evidence. The instant case involves the proper role of federal courts in reviewing claims involving the impact of constitutional error that may have tainted the jury's fact finding process. As such, this case implicates values venerated and fundamental to the United States legal system as those decided by *Martin v. Hunters Lessee*, 1 Wheat. (13 U.S.) 304 (1816) and *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264 (1821).

Congress requires federal courts to monitor state courts' provision of federal constitutional rights through various devices, including both the possibility of direct petitions for certiorari pursuant to 28 U.S.C. § 1257, as well as through federal habeas scrutiny of state convictions as set forth in 28 U.S.C. § 2254. This case presents the serious question of whether it is proper for a single United States Court of Appeals to overturn nearly a quarter century of jurisprudence of the scope of federal habeas corpus remedy, when Congress has enacted § 2254 under the authority of the Constitution's Supremacy Clause reflecting the fundamental importance of habeas corpus, Article I, Section 9, Clause 2, in a Constitution that recognizes the

preeminence of the need to "promote ... and secure the Blessings of Liberty" (Preamble).

The importance of habeas corpus in constitutional jurisprudence is suggested by the fact that the Sixth Amendment right to trial assistance by counsel was established in *Giddeon v. Wainwright*, 372 U.S. 335 (1967), a federal habeas case. The right to a public trial stems from the use of state habeas, subsequently brought before the United States Supreme Court by certiorari in *In re Olliver*, 333 U.S. 257 (1948). Such fundamental rights reflect the fundamental role of habeas corpus protection of personal liberty.

Moreover, the importance of habeas relief for testing the propriety of a state criminal conviction reaches beyond concerns with increasing the deterrent impact of *Miranda* rules upon the police.[7] In cases covered by *Stone v. Powell*, 428 U.S. 465 (1976), the "truth" of improperly admitted physical evidence is in no way impeached by improper admission. However, "truth" bears a central relationship to the values underlying the mandates of *Miranda*. Constitutional error in admitting *Miranda* precluded testimony goes straight to the guilt or innocence of the defendant, directly to the heart of the conviction.

It is in close cases that the presumption of innocence becomes particularly important, a presumption that the defendant

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[7] Indeed, such deterrence is only distantly related to the issues presented in the instant case, for it was not error by the police but error by the prosecutors at trial that forms the basis for the finding by each of four reviewing courts that constitutional error occurred during Mr. Brecht's trial.

is entitled to until the jury finds to the contrary. The instant case is a close case on the facts, closeness which can be measured objectively by the fact that every reviewing court has reversed the result of the court preceding it, or subjectively by the facts and arguments at trial. When the victim himself stated that he did not know why the shooting occurred, it was for the jury, not a judge, to determine whether Mr. Brecht's defense of accident was true or not.

The case is thus important to the relationship of the federal and state court systems, but also important for protection of Mr. Brecht's rights to due process and to his right to be found guilty by a jury of his peers.

The facts of this case lead to the inescapable conclusion that the mandates of due process embodied in the Fifth and Fourteenth Amendments have been violated as to the Petitioner, Mr. Todd A. Brecht. The preservation of rights guaranteed by the United States Constitution continues only to the extent that those rights are protected. By changing the standard of review for adjudicating violations of the rights articulated in *Doyle v. Ohio*, the Seventh Circuit creates a hierarchy of Constitutional values that is, at best, illusory. This Court should take the opportunity to resolve an issue which has been raised repeatedly by the various Courts of Appeal. By correcting the error generated by *Brecht v. Abrahamson*, this Court will also resolve the express conflict among the circuits that has resulted from the decision. Further, this Court's review stands to reassert the

continuing validity of its earlier decision in *Chapman v. California* relative to the standard for reviewing the magnitude of constitutional trial error.

I. The *Brecht* decision undermines the significance of the rights articulated in *Doyle v. Ohio* and conflicts with the decision of this Court in *Chapman v. California*.

The Seventh Circuit holds in *Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir. 1991), that the standard of harmlessness on collateral enforcement of *Doyle v. Ohio* 426 U.S. 610, 96 S.Ct. 2240 (1976) is whether the error had a substantial and injurious effect or influence in determining the jury's verdict. 944 F.2d at 1375.

The announcement of this standard of review seriously undermines this Court's pronouncement in *Chapman v. California* that constitutional error remains grounds for reversal unless found "harmless beyond a reasonable doubt". 380 U.S. 18, 24; 87 S.Ct. 824 (1967). The Seventh Circuit justifies its departure from the mandate of *Chapman* on two primary grounds. First, the court maintains that the rights established in *Doyle v. Ohio* are "prophylactic" in nature because they are not specifically found in the text of the constitution. Secondly, the Seventh Circuit holds that the *Chapman* standard of harmlessness does not apply to federal collateral review of the violation of "prophylactic" rights.

Both prongs of the Seventh Circuit's analysis conflict with prior decisions of this Court as well as with the decisions of many Circuit Courts of Appeal. Moreover, the holding in *Brecht* drastically reduces the federal protection of rights guaranteed by the due process clause of the United States Constitution as well as the Sixth Amendment right to trial by jury.

A. The rights articulated in *Doyle v. Ohio* are not entitled to lesser constitutional protection.

In *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976), this Court addressed the extent to which individuals could safeguard the rights mandated by *Miranda v. Arizona*, 384, U.S. 436, 86 S.Ct. 1602 (1966). The specific question presented in *Doyle* asked whether prosecuting authorities could impeach a defendant with his own post-arrest silence despite having been advised that he need not speak. The court in *Doyle* noted that, "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested". 426 U.S. at 617. Maintaining that the prosecution should not be able to capitalize on this ambiguity, this Court held that, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial". Id. at 618.

In *Brecht*, the Seventh Circuit characterizes the rule in Doyle as a "prophylactic" protection. 944 F.2d at 1370. According to the court, "(i)t has nothing to do with the

defendant's guilt and everything to do with insisting that the government play straight with those it prosecutes". Id. The *Doyle* decision, however, involves constitutional considerations that are more fundamentally important than the Seventh Circuit suggests.

According to this Court, a violation of the rights provided for in *Doyle* remains barred by the due process clause of the constitution. While this Court has had the opportunity to reassess its holding in *Doyle*, it has not yet chosen to do so. In fact, in *Greer v. Miller*, this Court specifically refused to review the question of whether *Doyle* violations were of lesser constitutional significance. 483 U.S. at 765. At the very least, this Court's opinion in *Doyle* does not rank the right to be free from impeachment with one's post arrest silence on a hierarchy of constitutional values. Therefore, while *Doyle* remains unmodified and unqualified by this Court, the Seventh Circuit has expressly acted to reduce the scope of that holding by lessening the burden on prosecutors to justify a *Doyle* violation. Moreover, the Seventh Circuit dismisses the fact that *Miranda* violations involve issues of truth and thus go far beyond mere "prophylactic" considerations.

Of the four courts that have reviewed the present case, not one has failed to detect a violation of the strictures of *Doyle v. Ohio*. In fact, each court specifically found constitutional error in the prosecutor's commentary and repeated questioning of Mr. Brecht relative to his post-arrest silence. The basis for the

Seventh Circuit's decision in *Brecht*, therefore, was not the court's failure to find a *Doyle* violation, but rather, the constitutional significance to be attributed to the error that plainly existed.

B. The *Chapman* standard of harmlessness applies to collateral review of *Doyle* violations.

The means for addressing constitutional error has been settled by this Court since 1967 in the case of *Chapman, v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967). In *Chapman*, the Court for the first time noted that there may be some constitutional errors which, given their "harmlessness", do not require automatic reversal of conviction. 386 U.S. at 22. However, the court held that, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt". Id. at 24.

The *Chapman* case itself dealt with the prosecutor's commentary on the defendant's failure to testify on his own behalf. However, the applicability of the new harmlessness standard was specifically made inclusive of other constitutional rights. That the protection of rights such as those articulated in *Doyle* was contemplated in the *Chapman* decision was made quite clear. In discussing the scope of the new rule, the Court stated;

> An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless.

> Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it the burden to show that it was harmless. Id. at 23-4.

More importantly, the applicability of the *Chapman* standard was never made contingent on the method of federal review. While *Chapman* itself was heard before this court on direct appeal, the decision did not circumscribe its applicability to collateral enforcement of federal rights. To date, this court has never drawn such a distinction although it has had such an opportunity in the context of a *Doyle* violation. When the issue was most recently raised in *Greer v. Miller*, the court, in fact, deferred decision on the question stating that, "we have no occasion to consider whether *Doyle* errors may be viewed differently on collateral attack from on direct review". 483 U.S. at 756.

Notwithstanding the current applicability of the *Chapman standard*, the Seventh Circuit holds in *Brecht*, for the first time in any Court of Appeals, that a different standard applies to the review of *Doyle* violations in federal habeas corpus proceedings. According to the court, the standard of harmlessness is not unitary but, "varies with the nature of the underlying right". 944 F.2d at 1371. *Doyle*, argues the court, is a prophylactic rule which functions mainly to implement the mandate of the *Miranda* decision that to sift innocence from guilt. Since the prohibition against commenting on a defendant's post-arrest silence does not operate to enforce a specific, textual constitutional provision, its violation should be addressed with lessened scrutiny on collateral review. "When the rule is as far removed from

protecting the innocent as is *Doyle*, there is no need for the strict enforcement that the *Chapman* standard creates". Id. at 1374. According to the Seventh Circuit, constitutional errors which might require reversal on direct appeal do not allow for collateral review at all unless the trial itself has been unalterably infected.

Yet the Supreme Court has itself recently applied the *Chapman* standard in "collateral" habeas corpus proceedings. In both *Rose v. Clark*, 478 U.S 570, (1986) and *Yates v. Evatt*, 111 S.Ct. 1884 (1991), this Court held that challenged jury instructions would be reviewed under the "harmless beyond a reasonable doubt" standard. In both cases, the alleged constitutional violations related to the use of jury instructions which allowed the prosecutor to evade the requirement of proving the defendant guilty beyond a reasonable doubt. The decisions in *Rose* and *Yates* suggest that this Court remains committed to the application of the *Chapman* standard in the collateral enforcement of federal rights. The *Chapman* standard should therefore have been used to address the constitutional error in Mr. Brecht's case. With all due respect, the reason that Mr. Brecht chose to stay silent after having been read his *Miranda* rights up until he took the witness stand, is not a constitutional part of the jury's fact finding process and cannot be used to infer guilt. Such an inference, however, goes directly to guilt.

C. The *Brecht* decision creates a conflict among the circuits as to the standard for reviewing violations of *Doyle v. Ohio*.

In its opinion, the Seventh Circuit acknowledges that its decision conflicts squarely with that of the Eighth Circuit in *Bass v. Nix*, 909 F.2d 297 (8th. Cir. 1990). While noting that, "the Supreme Court has not delineated the standard of review for evaluating the prejudicial effect of a Doyle violation", the Eighth Circuit nonetheless held in *Bass* that it would apply the harmless beyond a reasonable doubt standard when addressing *Doyle* violations.

Yet the Eight Circuit is not alone in applying the *Chapman* standard to violations of *Doyle v. Ohio*. The Seventh Circuit now departs from its recent pronouncement that the question was not an open one. *United States v. Shue*, 766 F.2d 1122 (7th Cir. 1985)(the Seventh Circuit applies the harmless beyond a reasonable doubt standard to *Doyle* violations).

In *Miller v. Greer*, 789 F.2d 438, 442-3 (7th Cir. 1986), *reversed on other grounds*, 483 U.S. 756; 107 S.Ct. 3102 (1987), the Seventh Circuit noted its membership on the role of circuits which, "universally apply this harmless beyond a reasonable doubt standard to *Doyle* violations.... *United States v. Elkins*, 774 F.2d 530 (1st Cir. 1985); *Hawkins v. LeFevre*, 758 F.2d 866 (2d Cir. 1985); *United States v. Cummiskey*, 728 F.2d 200 (3d Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1869, 85 L.Ed.2d 162

(1985); *Williams v. Zahradnick*, 632 F.2d 353 (4th Cir. 1980); *Chapman v. United States*, 547 F.2d 1240 (5th Cir), cert. denied, 431 U.S. 908, 97 S.Ct. 1705, 52 L.Ed.2d 393 (1977); *Martin v. Foltz*, 773 F.2d 711 (6th Cir. 1985); *United States v. Disbrow*, 768 F.2d 976, (8th Cir. 1985); *United States v. Ortiz*, 776 F.2d 864 (9th Cir. 1985); *United States v. Remigio*, 767 F.2d 730 (10th Cir. 1985); *United States v. Ruz-Salazar*, 764 F.2d 1433 (11th Cir. 1985)".

The Seventh Circuit's decision in *Brecht*, therefore, stands in marked opposition to the decisions of its sister circuits.

II. The erroneous admission of evidence relative to the Petitioner's homosexuality was so prejudicial as to deprive him of his constitutional right to due process of law.

The entirety of the evidence weighed by the jury in Mr. Brecht's case related to his intent to kill Roger Hartman. Whether Mr. Brecht had in fact shot Mr. Hartman was not at issue since Mr. Brecht admitted to the act.

While acknowledging that its case against Mr. Brecht was circumstantial, the prosecution attempted to provide a motive for the shooting. Despite repeated objections from defense counsel, the State was allowed to question several witnesses about the Petitioner's homosexuality. It was the State's theory that the shooting was a response to Mr. Hartman's expressed aversion to his brother-in-law's sexual orientation. Both Mr. Brecht and his

sister (the decedent's wife) were questioned about whether Mr. Hartman had ever made his feelings known to Mr. Brecht. While acknowledging her husband's disapproval, Molly Hartman denied that such feelings were ever expressed to Mr. Brecht.

Instead of providing a motive, therefore, the prosecution succeeded only in introducing highly prejudicial evidence that lacked probative value. In granting Mr. Brecht's petition for a writ of habeas corpus, the District Court below found that the evidence of Petitioner's homosexuality was, "not relevant to any purported motive petitioner had to shoot his brother-in-law". 759 F.Supp. at 509.

The District Court noted that other federal courts had found the introduction of such evidence to constitute a denial of due process. "Evidence of homosexuality is extremely prejudicial in a criminal trial and even a limiting instruction to the jury is not sufficient to obviate the prejudice". 759 F.Supp. at 509 (quoting *United States v. Gillespie*, 852 F.2d 475, 479 (9th Cir. 1988)).

In *Brecht*, the Seventh Circuit held that such an evidentiary question could not properly form the basis for habeas relief. The court stated that, "a federal court may not issue the writ on the basis of a perceived error of state law". 944 F.2d at 1366. However, the Seventh Circuit ignored its own pronouncement to the contrary. Specifically, that a district court can issue a writ of habeas corpus when an erroneous state evidentiary ruling is of such magnitude that the result is a denial of fundamental fairness. *Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir. 1988).

This Court has also utilized the same standard for deciding whether a state evidentiary ruling is reviewable (Errors in admitting evidence violate the Constitution if the trial as a whole is so infected that the verdict is no longer reliable. *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). See also; *Lisenba v. California*, 314 U.S. 219, 228, 62 S.Ct. 280, 86 L.Ed. 166 (1941).

Since the Seventh Circuit did not properly consider whether or not the verdict in *Brecht* was "infected" to such a degree that the verdict was no longer reliable, its decision failed to properly consider Mr. Brecht's allegation that he was denied due process of law. Such a failure constituted a perpetuation of the violation of Mr. Brecht's constitutional rights that occurred during his trial when such evidence was erroneously admitted.

CONCLUSION

In its *Brecht decision*, the Seventh Circuit embarks on a journey that is unsanctioned by either Congress or this Court. By changing the standard for reviewing *Doyle* violations in habeas corpus proceedings, the Seventh Circuit does more that question this Court's pronouncement that commentary on a defendant's post-arrest silence violates the due process clause of the constitution. It also suggests that this Court's standard for harmlessness, as articulated in *Chapman*, is too broad. By reversing the *Brecht* court's decision, this Court can reassert both *Doyle* and *Chapman* and resolve the present conflict that

exists among the circuits on this issue. The Court can also thereby avoid reaching serious constitutional questions regarding the Sixth Amendment right to trial by jury. Finally, by granting certiorari, the Court can also examine the highly inflammatory issue of homosexuality in criminal trials and its relationship to due process.

For these reasons, Petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

Allen E. Shoenberger*
Counsel for Petitioner

* Counsel of Record

February 17, 1992

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No. 91-7358

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

TODD A. BRECHT,

Petitioner,

v.

GORDON A. ABRAHAMSON, SUPERINTENDENT,
DODGE CORRECTIONAL INSTITUTION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT
IN OPPOSITION TO PETITION

SUMMARY OF ARGUMENT

The petitioner requests this court to review the United States Court of Appeals for the Seventh Circuit's decision changing the standard of review on habeas corpus for errors committed similar to those in Doyle v. Ohio, 426 U.S. 610 (1976). In so arguing, the petitioner contends that the court's decision violates the sixth and fourteenth amendments to the constitution.

It is a fundamental rule of judicial restraint that the United States Supreme Court will not reach constitutional questions in advance of the necessity of deciding them. Prior to reaching any constitutional questions, this court will consider non-constitutional grounds for decision. On the basis of judicial restraint, this court should deny the petitioner's request.

A significant non-constitutional basis exists for affirming the Seventh Circuit's determination. Prior to this case, the Seventh Circuit, as well as all other circuit courts of appeals, granted habeas corpus relief for Doyle violations if it could not be shown that the errors were harmless "beyond a reasonable doubt." The facts and circumstances surrounding the petitioner's conviction establish that any Doyle violations which occurred were harmless error under this traditional standard of review.

Courts look to a number of factors in determining the existence of harmless Doyle errors. One such factor is the frequency of the references to silence. In this case, there existed only four prohibited references to post-Miranda silence occurring during a trial which consumed over 900 pages of transcript. The focus of comments on the defendant's silence were on the petitioner's attempt to tailor his evidence to the state's case.

Courts also look to how the prosecution uses the defendant's silence in determining whether improper comments on a defendant's silence were harmless "beyond a reasonable doubt." In this case, the defendant had numerous pre-Miranda warning contacts with both

citizens and police following the homicide during which he failed to mention that his victim needed aid or assistance. Comments on pre-Miranda were properly admissible. Improperly admitted comments on the petitioner's silence were directed towards showing that the petitioner was attempting to tailor his testimony to the state's case. The state's case did not focus on post-Miranda silence.

In determining whether harmless error occurred, courts also consider the opportunity to grant a motion for mistrial or to give a curative instruction. In the case at bar, the petitioner did not object to all of the alleged comments on post-Miranda silence that have been found objectionable. Additionally, once an objection was raised, the petitioner did not ask for curative instructions.

Lastly, courts also consider and weigh the evidence indicative of guilt. The only contested issue at trial was whether or not the petitioner intended to shoot his victim. Substantial evidence exists supporting the jury's determination that the shooting was not an accident. The shooting victim had to crawl to his neighbor's residence in order to obtain medical assistance. He immediately demanded that law enforcement authorities be summoned. He also warned that his wife should not be allowed to return to the residence in which the shooting occurred.

Physical evidence also showed that the shooting was not accidental. The petitioner testified that the gun accidently went off as he was falling to the ground. However, the trajectory of the bullet which entered Roger Hartman contradicted the

petitioner's story insofar as the bullet traveled on a horizontal or slightly upward trajectory.

The jury also had before it sufficient reason not to find the petitioner's testimony credible. The petitioner had to admit while testifying that he often lied and often used aliases. On cross examination, the defendant lied concerning his desire to return to Georgia and bail his friend out of jail. The jury also could consider that the petitioner fled the crime scene, sought no help for his shooting victim, and from the time of the shooting until he was arrested made no attempts to convince anyone that the shooting was accidental.

Because the evidence in this case establishes that if error occurred, it was harmless error "beyond a reasonable doubt," it would be unnecessary for this court to reach the constitutional issue of whether or not a different harmless error test should apply on collateral review. Therefore, this is not the type of case that this court should grant a writ of certiorari.

The petitioner also argues that the Seventh Circuit decision conflicts with Chapman v. California, 386 U.S. 18 (1967), and inappropriately reflects a diminished harmless error test for Doyle violations. The Seventh Circuit decision does not conflict with Chapman v. California, 386 U.S. at 18, insofar as Chapman did not involve habeas corpus collateral review. What must be remembered is that appellate review in state courts will still involve the Chapman standard. State courts will continue to apply the harmless "beyond a reasonable doubt" standard when reviewing Doyle

violations. The Seventh Circuit determination does not conflict with Chapman because the less stringent standard articulated in this case only applies to habeas corpus collateral review.

The cases the petitioner cites in support of his petition do not conflict with the determination of the Seventh Circuit in this case. Citing Rose v. Clark, 478 U.S. 570 (1986), and Yates v. Evatt, ___ U.S. ___, 111 S. Ct. 1884 (1991), the petitioner argues that this court has consistently applied the harmless "beyond a reasonable doubt" standard in habeas corpus proceedings. In so arguing, however, the petitioner ignores the fact that the court's application of that standard in those cases did not involve the violation of a "prophylactic" rule. Rose and Yates involved trial errors in instructing the jury on the elements of the offenses. Consequently, those cases are distinguishable from this case because the errors related directly to the guilt or innocence of the defendant. As noted by the Seventh Circuit, Doyle type errors do not directly involve evidence relating to the guilt or innocence of a given defendant.

Employing the law of evidence, the Wisconsin Supreme Court ruled that the evidence of the petitioner's homosexuality as it related to his relationship with Roger Hartman was more probative than it was prejudicial. Consequently, the court ruled that it was properly admissible on the issue of motive. The Seventh Circuit correctly ruled that federal courts cannot issue writs of habeas corpus on perceived errors of state law unless the errors render the verdict unreliable. In this case, that standard was not met.

ARGUMENT

I. THE SEVENTH CIRCUIT'S USE OF A LESS STRINGENT TEST ON COLLATERAL HABEAS CORPUS REVIEW FOR ALLEGED TRIAL ERRORS NOT INVOLVING THE GUILT OR INNOCENCE OF THE DEFENDANT SHOULD NOT BE REVIEWED BY THIS COURT.

A. This court should deny the petition for certiorari because the constitutional issue which has been raised can be avoided by determining that the Doyle errors committed at trial were harmless "beyond a reasonable doubt."

A unanimous Wisconsin Supreme Court concluded that while there were Doyle type errors committed during the petitioner's trial, those errors were "harmless beyond a reasonable doubt." It is the position of the respondent that regardless of which standard of review is adopted for Doyle errors raised on habeas corpus, whether it be the Chapman harmless" beyond a reasonable doubt" standard cr the lower standard adopted in this case, the Doyle errors which occurred were harmless. Consequently, it is respondent's position that the petition for writ of certiorari should not be granted insofar as judicial restraint would require this court not to address the constitutional issue of whether a diminished standard should apply.

It is a well-settled rule of law that "[p]rior to reaching any constitutional questions, federal courts must consider non-constitutional grounds for decision." Jean v. Nelson, 472 U.S. 846, 854 (1985), quoting Golf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981), City of Mobile, Ala. v. Bolden, 446 U.S. 55, 60 (1980), Kolender v. Lawson, 461 U.S. 352, 361, n.10 (1983). This is a

"fundamental rule of judicial restraint." Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 157 (1984). As this court stressed in Spector Motor Service v. McLaughlin, 323 U.S. 101, 105 (1944), "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable." See also Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 445-46 (1988); United States v. Gerlach Live Stock Co., 339 U.S. 725, 735 (1950).

No matter which standard of review is employed, the facts underlying the petitioner's conviction establish that any Doyle errors were "harmless beyond a reasonable doubt." This is so because the Doyle errors themselves would have had little or no effect on the jury's deliberations. Lawfully admitted evidence showed that prior to his arrest, the petitioner had numerous chances to seek help for Roger Hartman and encountered numerous persons to whom he could have explained how the shooting occurred. The evidence showed that he failed to do so. Lawfully admitted evidence also showed that the petitioner continued in his silence after his arrest but before he was given his Miranda warnings. Consequently, any evidence or comments concerning his post-Miranda warning silence were redundant and cumulative to the evidence regarding his silence which was properly admitted at trial. Given the fact that the jury heard numerous lawful references to the petitioner's silence, the fact that the jury heard brief

erroneously admitted references to silence renders such error significantly less meaningful.

Another factor which should be considered in evaluating error for harmlessness is the intensity and frequency of the references to silence at trial. In this case the petitioner's silence was infrequently mentioned. The courts below found only four short references to prohibited post-Miranda silence made during cross-examination and closing argument in a transcript which totals approximately 900 pages. In terms or intensity, the comments on silence were merely indirect references to the petitioner's continuing failure to render aid or request help for his shooting victim, or were references to the fact that his testimony was tailored to the state's case.

In determining harmlessness, another factor which should be considered is the trial court's opportunity to grant a motion for mistrial or to give a curative instruction. The petitioner did not object to all of the alleged comments on post-Miranda silence that were found violative of the petitioner's constitutional rights. On the occasions that an objection was raised, the petitioner did not ask for a curative instruction (D. 7, Ex. M, pp. 881, 901, 883).[1]

Lastly, a court should consider the degree of other evidence indicative of guilt. There were only two witnesses to the shooting of Roger Hartman. Only the petitioner and Hartman were there. The

[1] All citations to the record refer to the document number("D"), any included exhibit to the document ("Ex.") and to the page number ("p.").

jury heard Roger Hartman's version of the shooting through statements he gave to his neighbors while suffering from a wound which would eventually take his life. The jury heard the petitioner's version that the shooting was accidental when the petitioner took the witness stand to testify. The jury, evaluating the credibility of the two versions, accepted Hartman's and rejected the petitioner's. Many strong and justifiable reasons exist for the jury's decision.

Speaking through neighbors who overheard his statements offered soon after he was shot, Hartman told the jury that he had been shot by his brother-in-law, "Todd Brecht" (D. 7, Ex. M, p. 164). Hartman took care to emphasize that it was his brother-in-law who had shot him. If it was an accidental shooting, Hartman would have no reason to emphasize who the person was who shot him.

Hartman knew that his assailant was in the basement of his home. Hartman related that "[h]e's down there in the house in the basement" (D. 7, Ex. M, p. 153). If the shooting had been an accident, Hartman would have had no reason to tell his neighbors the location of the petitioner.

One of the first things Hartman requested was that his neighbor call the sheriff (id.). If the shooting was an accident, Hartman would not have demanded that the sheriff be called.

Hartman did not want his wife or neighbor to go near his house after the shooting. Referring to his wife, Molly, Hartman stated "Oh my God, don't let her go in that house, don't let her near that house" (D. 7, Ex. M, p. 166). Hartman also warned that his

neighbor shouldn't be allowed to go into his house in light of the shooting (D. 7, Ex. M, p. 169). If the shooting was accidental, why would Hartman not want his wife or neighbor to enter their home?

Additionally, Hartman explained that he "sneaked out" of his home and crawled on his hands and knees to get to his neighbors (D. 7, Ex. M, p. 167). If the shooting was an accident, why did he have to "sneak" out of his home?

Ironically, Hartman knew that he was shot with a .22 caliber weapon. Therefore, he must have seen the petitioner with the weapon prior to being shot in the back (D. 7, Ex. M, p. 164). This undercuts the petitioner's defense of accident insofar as Hartman seeing the petitioner with the gun in hand, is inconsistent with the petitioner's version of the shooting (D. 7, Ex. M, pp. 588-89).

The jury found the petitioner's version of the shooting incredible with good reason. The petitioner had to admit that he was a liar and often used aliases (D. 7, Ex. M, pp. 605, 611). While on the witness stand, the petitioner testified it was his intent when he got into trouble in Georgia to go back to Wisconsin with the Hartmans, work on his problems, get a job, and remain in Wisconsin (D. 7, Ex. M, p. 616). He made it clear he had no intent to return to Georgia (D. 7, Ex. M, p. 627). However, the state was able to produce letters which the petitioner had written to an inmate in Georgia which stated, contrary to the petitioner's earlier representation, that he intended to return to Georgia and

bail out his friend no matter what it cost (D. 7, Ex. M, pp. 621-22). During its rebuttal case, the state circumstantially proved that on the morning of the shooting, the petitioner had telephoned the Georgia prison where his friend was incarcerated and told a guard that he would be down to Georgia within days to bail the friend out (D. 7, Ex. M, pp. 758-60).

The petitioner's version of the shooting was also undermined by the physical evidence. The petitioner was approximately 5 feet 7 or 8 inches tall (D. 7, Ex. M, p. 663). The petitioner testified that the gun went off as he was falling down (id.). Roger Hartman was 6 feet tall (D. 7, Ex. M, p. 384). Hartman was shot in the back with the bullet exiting through his chest (D. 7, Ex. M, pp. 553-54). The trajectory of the bullet was horizontal to slightly downward (D. 7, Ex. M, pp. 553-54). If the petitioner tripped and the gun went off as he was falling, it would be expected that the bullet's trajectory would be horizontal or slightly upward.

The petitioner's accident account of the shooting is also inconsistent with his conduct following the shooting. The petitioner fled the crime scene. Flight, in and of itself, is indicative of guilt. Despite numerous opportunities, he sought no help for Roger Hartman. Instead, he claimed that he engaged in a failed attempt to take his own life (D. 7, Ex. M, p. 591). He encountered numerous individuals, both non-law enforcement and law enforcement, and never even suggested that he had shot someone and that they might need help. Such evidence was lawfully introduced and undercuts his accident claim. That course of conduct is simply

inconsistent with the way human nature deals with an accident. When an accident occurs, human nature drives us to render aid. Persons do not decide to immediately kill themselves when they accidentally injure someone. They help them.

The jury's determination that the shooting was intentional was also supported by the physical evidence found at the scene of the crime. If the shooting was accidental, why was a bedroom phone left off the hook, rendering other phones in the house inoperable (D. 7, Ex. M, pp. 222, 255)? The jury could have inferred that the petitioner rendered the phones inoperable so Hartman could not call for help. Why did the petitioner take the precaution of hiding the .22 cartridge boxes under a blanket (D. 7, Ex. M, p. 271, 391-92)? The jury could have inferred that they were hidden so Hartman would not realize the petitioner was in possession of a gun. Why were all of the beer cans in the upstairs portion of the house hidden (D. 7, Ex. M, pp. 272, 408-409)? The jury could have inferred that the beer cans were hidden so that Hartman, a recovering alcoholic, would not see them and realize that the petitioner was violating his probation and the rules of the Hartman household by drinking. Why did the petitioner take the time to place the butcher block containing cutlery normally stored on top of a kitchen counter under the sink inside a cabinet (D. 7, Ex. M, pp. 400-402, 408)? The jury could have inferred that the knives were hidden so that Hartman would not have easy access to a weapon with which he could defend himself. Although such evidence is circumstantial, it

underscores and supports the verdict and contradicts the petitioner's story that the shooting was accidental.

B. The decision of the Seventh Circuit Court of Appeals did not diminish the protection of the fifth amendment insofar as the Chapman standard will still be used in state courts for evaluating whether Doyle errors are harmless.

Throughout the petitioner's brief filed in support of his petition for writ of certiorari, he suggests that the Seventh Circuit Court of Appeals' decision significantly impacts the protections afforded criminal defendants under the fifth and fourteenth amendments to the constitution. The petitioner overstates the impact of the Seventh Circuit's decision.

In determining whether the Doyle errors which occurred at the petitioner's trial were harmless or whether they required reversal, both the Wisconsin Court of Appeals and the Wisconsin Supreme Court employed the Chapman standard. The unanimous Wisconsin Supreme Court concluded that the Doyle errors were harmless "beyond a reasonable doubt." State v. Brecht, 143 Wis. 2d 297, 319, 421 N.W. 2d 96 (1988). Under the Seventh Circuit's decision, use of the Chapman standard by state courts will not change. In order for Doyle errors to not result in a reversal, state appellate courts will still have to conclude that the errors were harmless "beyond a reasonable doubt." Under the Seventh Circuit's decision, it is only upon collateral habeas corpus review that state court determinations under the Chapman standard will not be overturned

unless the Doyle errors "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 944 F.2d 1363, 1375 (7th Cir. 1991) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Consequently, the impact of the Seventh Circuit's decision on a defendant's constitutional rights to silence and due process is limited.

C. The decision of the Court of Appeals for the Seventh Circuit is not in conflict with earlier decisions of this court.

The petitioner contends that the Seventh Circuit's decision conflicts with the decisions of this court in Rose v. Clark, 478 U.S. at 570 and Yates v. Evatt, 111 S. Ct. at 1884. Petitioner argues that these cases conflict with the decision of the Court of Appeals for the Seventh Circuit because in Rose and Yates this court applied the Chapman standard in collateral habeas corpus proceedings (Petition at 19). While Rose and Yates both used the Chapman standard in the habeas corpus context, both cases are distinguishable from the one at bar because they involve errors going to the heart of the guilt or innocence of the accused. As was pointed out by the Seventh Circuit in this case, these cases are distinguishable from cases such as this where the alleged errors involved the enforcement of a "prophylactic" rule not directly involved with the guilt or innocence of the accused. Brecht v. Abrahamson, 944 F.2d at 1375.

The Court of Appeals for the Seventh Circuit addressed the question of whether or not this court had previously applied the

Chapman standard in cases where the alleged trial errors did not directly involve the guilt or innocence of the accused. The court concluded that this court had not applied the Chapman standard in that context. Brecht, 944 F.2d at 1374-75. Additionally, the Seventh Circuit directly analyzed Yates v. Evatt and Rose v. Clark to determine whether or not the Chapman standard must be used on collateral habeas corpus review. The Seventh Circuit concluded that both Rose and Yates involved errors in instructing the jury on the elements of the charged crime and, therefore, directly involved the guilt or innocence of the accused. Both Rose and Yates dealt with constitutional rules designed to protect the innocent from an unconstitutional finding of guilt. The Seventh Circuit contrasted Yates and Rose with the alleged Doyle violations in this case and found that Doyle violations involve a "penumbral" rule not directly involving the guilt or innocence of an accused. Brecht, 944 F.2d at 1374-75. Consequently, the Seventh Circuit correctly concluded that this court had not applied the Chapman standard in circumstances similar to those now before the court. Id.

II. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT CORRECTLY REFUSED TO REVIEW ALLEGED ERRORS INVOLVING THE APPLICATION OF STATE EVIDENTIARY RULES.

The evidence at trial showed that Roger Hartman had a difficult time accepting the petitioner's homosexuality and asked him not to engage in such activities while living at the Hartman residence. Petitioner had also been advised by Hartman and

Hartman's wife that he could not bring a homosexual friend into their house. Hartman also conveyed to the petitioner that he ought to get professional counseling for his homosexuality (D. 7 Ex. M, p. 392-93, 400, 434).

Based upon the above, it is an inescapable conclusion that Roger Hartman could not accept the petitioner's homosexuality and, despite the suggestion of the petitioner to the contrary, the above facts show that Hartman's feelings and beliefs were conveyed to the petitioner.

Both the trial court and the Wisconsin Supreme Court determined that the evidence concerning Hartman's disapproval of the petitioner's homosexuality suggested a possible motive for the shooting and, therefore, made more probable the state's claim that Brecht had, in fact, murdered Hartman. Basing its ruling on state evidentiary law, the Supreme Court of Wisconsin concluded that the trial court did not abuse its discretion in determining that evidence of Brecht's homosexuality was probative on the issue of motive in the case. The Wisconsin Supreme Court reinforced its position by noting that the trial court had given the jury a limiting instruction on the proper consideration of the homosexuality evidence. State v. Brecht, 143 Wis. 2d at 321-22.

The Court of Appeals for the Seventh Circuit properly concluded that the question of whether the probative force of the evidence involving Brecht's homosexuality exceeded its potential for improper use were questions in the law of evidence. Citing Cupp v. Naughten, 414 U.S. 141 (1973), and Lisenba v. People of

State of California, 314 U.S. 219 (1941), the Seventh Circuit noted that errors in admitting or excluding evidence did not violate the constitution unless the trial as a whole is so infected that the verdict is no longer reliable. Brecht, 944 F.2d at 1366. The court also noted that a "federal court may not issue [a] writ [of habeas corpus] on the basis of a perceived error of state law." Id., quoting Pulley v. Harris, 465 U.S. 37 (1984).

The Seventh Circuit refused to issue the writ on a perceived error of state law and did not find that the alleged error in admitting the evidence of homosexuality so infected the trial as a whole as to render the verdict "no longer reliable."

Applying the correct law, and evaluating the proceedings below under the correct standards, the Court of Appeals for the Seventh Circuit made the correct ruling. The petitioner suggests that the Seventh Circuit failed to evaluate the evidentiary ruling under the "fundamental fairness" standard. Ironically, in making his argument, the petitioner cites the "fundamental fairness" standard set forth in Cupp v. Naughten (Petition at 23). The petitioner, however, ignores the fact that the Seventh Circuit cited that standard as one which is to be applied when a defendant requests a reversal on habeas corpus on the basis of an erroneous state court ruling. Brecht, 944 F.2d at 1366.

Given the fact that the Court of Appeals for the Seventh Circuit applied the proper law and reached the correct conclusion, this issue does not present the type of question which would be the proper subject for review by this court.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Dated this 30th day of April, 1992.

Respectfully submitted,

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April 30, 1992

William K. Suter, Clerk
United States Supreme Court
One First Street N.E.
Washington, D.C. 20543

Re: Todd A. Brecht v. Gordon A. Abrahamson
Case No. 91-7358

Dear Mr. Suter:

Enclosed for filing in the above-entitled action please find twelve copies of our Brief for Respondent in Opposition to Petition.

By copy of this letter, and as indicated by the attached affidavit of mailing, a copy of the enclosed has been served this date upon counsel for petitioner. An affidavit of mailing is also enclosed in this regard.

Thank you for your attention to this matter.

Sincerely,

Jeffrey M. Gabrysiak
Assistant Attorney General

JMG:hms

Enclosures

cc: Allen E. Schoenberger

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Case No: 91-7358

Case Name: Todd A. Brecht v. Gordon A. Abrahamson

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Holly M. Stark, being first duly sworn, on oath deposes and says that: she is not a party to the above-entitled action; she is employed in the office of the Department of Justice of the State of Wisconsin in the capacity of legal secretary;

On the 30th day of April, 1992, she served one copy of the Brief For Respondent in Opposition to Petition upon:

Allen E. Schoenberger
One East Pearson Street
Chicago, Illinois 60611

by mail, in the following manner:

She properly mailed a true and correct copy of the aforesaid documents, addressed as stated above, by first-class mail, postage prepaid, but without any request to the postal officers for the return thereof in case of nondelivery to the person addressed and deposited the same in a United States mailbox in the City of Madison.

HOLLY M. STARK

Subscribed and sworn to before me
this 30 day of April, 1992.

Notary Public, State of Wisconsin
My Commission: expires

Supreme Court, U.S.
FILED
JUL 13 1992
OFFICE OF THE CLERK

No. 91-7358

In The

Supreme Court of the United States

October Term, 1992

TODD A. BRECHT,

Petitioner,

v.

GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed February 18, 1982
Certiorari Granted June 8, 1992

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4/11/91	Notice of appeal by respd of order 3-13-91.
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4/30/91	Brief in opposition to respondent's mo for stay of 3/13/91
5/10/91	ORDER and Opinion denying respondent's mo for stay of 3/13/91 ORDER stayed 30 days for repndt to file mo W/7th Cir.

6/4/91	ORDER from USCA that Allen Shoenberger is apptd to rep pltf on appeal
6/4/91	Copy of Respt's Mo to stay District Court's opinion
6/13/91	ORDER from USCA that dist crt's order releasing petr is hereby temporarily stayed until 6-14-91.
6/20/91	Judgment
6/21/91	ORDER from USCA that mo is GRANTED and dist crt order of 3-13-91 is STAYED pending appeal.
12/5/91	ORDER from USCA that dist. crt is REVERSED.
12/13/91	JUDGEMENT entered denying petr's petition for writ of Habeas Corpus.

United States Court of Appeals
for the Seventh Circuit

4/15/91	State Prisoner's habeas corpus case docketed Filed Appellant Gordon A. Abrahamson jurisdictional statement
4/29/91	Filed Notice of Non-Involvement by attorney Stan Thomas for Todd A. Brecht
5/29/91	Filed motion by Appellant Gordon A. Abrahmason [sic] for stay of district court's opinion and order granting habeas corpus relief dated 3/13/91, pending appeal.
5/31/91	ORDER: Prof. Allen E. Shoenberger is hereby Appointed to represent Todd A. Brecht per Criminal Justice Act. ORDER: Filed clerk's notice to Todd A. Brecht to file O&3 copies of response to Respondent's "Motion to Stay

District Court's Opinion and order Granting Habeas Corpus Relief Dated March 13, 1991, Pending Appeal" filed on 5/29/91.

6/17/91 ORDER. Argument set for Wednesday, July 10:1991 at 9:30 am.

6/18/91 ORDER issued GRANTING motion for stay pending appeal and the district court's order of 3/13/91 is STAYED pending appeal. It is further ordered that this appeal will be expedited for argument and disposition. This appeal will be set for oral argument on 7/10/91. ORDER: This appeal will be expedited for argument and disposition. The following briefing schedule is hereby adopted: The appellee(s) brief is due on or before 6/24/91 for Todd A. Brecht. The reply brief if any is due on 7/1/91 for Gordon A. Abrahamson.

9/26/91 Filed opinion of the court by Judge Easterbrook. REVERSED. Cudahy, concurring. Easterbrook, Pell. ORDER: Final judgment, REVERSED.

10/10/91 Filed 25c Petition for Rehearing with Suggestion for Rehearing enbanc [sic] by Todd A. Brecht.

11/20/91 ORDER: Appellee Todd A. Brecht petition for rehearing with suggetion [sic] for rehearing en banc is DENIED.

6/17/92 Judgment filed from Supreme Court. Motion to proceed in forma pauperis is granted: and the petition for writ of certiorari is granted (limited to question I by the petition).

* * *

CIRCUIT COURT OF BUFFALO COUNTY, WISCONSIN

Excerpts from transcript of proceedings:

Opening Statement by Defense Attorney, Mr. Ridgeway:

* * *

Todd decided to work outside and he did some wood loading and unloading and he pulled some flowers in the front of the house. Then he went over to the wood pile and he came back inside for awhile and at some point during the day he did slip – he had some beer, he did drink. The evidence will show that he was not intoxicated but he did have something to drink.

Later on in the afternoon he was sitting around in the house and Mr. Brecht looked in the closet. He saw the .22 sitting in the closet and he decided to do something. He would go outside, take the .22 and shoot at some cans. There is going to be some physical evidence presented to you that was found at the scene. One item of physical evidence that will come into evidence is a Dr. Pepper can. It was found out in the back of the Hartman's yard someways down from the house. It has what appears to be at least one bullet hole through the can. Another piece of physical evidence, that will be at least one cartridge, empty cartridge shell that was found outside of the Hartman's residence, not inside of the Hartman's residence.

Well Mr. Brecht target shot with the .22 and he was going to continue target shooting with the .22 and he had loaded it, and propped it up by the house and went off and got a load of wood. Then Roger Hartman came home, at about the time that he normally does, and he was getting off work and realizing that Mr. Hartman had

come home Mr. Brecht realized two things: he realized that he shouldn't have had the gun out, and he had left the beer cans that he was drinking out of in the house – at least one of them was sitting out in plain view and he realized unfortunately that he had let Roger Hartman down, the rules laid down were that he wasn't to be drinking and he had had something to drink. He came back to the house, grabbed the gun and he rushed inside to put the gun back and to hide the beer cans and by this time Roger Hartman was coming down the stairs. He came in, as you can see in the diagram through a garage area, in an underneath area where there is a laundry room and an area that opens onto the hallway. He thought that Mr. Hartman had already turned the stairs into the hallway and gone into the den area as was his habit. He was going to go through the hallway up the stairs into the bedroom and put the gun back and get the beer cans out of the trash. What happened was as he rushed around the corner he had a problem – he fell – and you will hear testimony concerning the problem Mr. Brecht has with his foot, and that Molly Hartman was also aware of it and that was that there is a sensation of numbness, paralysis and some difficulty that he has in lifting his foot especially when he is moving rapidly. As he fell a terrible accident occurred – the weapon was in his hand and he grabbed at the gun as he fell onto one knee, and the gun was discharged. The evidence will show thta [sic] it struck Roger Hartman down low in the small of his back, and that it knocked Roger Hartman to the floor. Todd froze – he yelled, "Roger – ". Mr. Hartman seemed to see him and as he just sat there not believing that this gun had gone off, not believeing [sic] what had

happened, he is not sure how long it was but when he looked up Roger Hartman was gone. He doesn't know how, but apparently in some way Mr. Hartman had gotten back up and was no longer in the hallway. Mr. Brecht was now very upset, he thought that he should look for Roger and he went out into the den area. Roger Hartman was not in the den either. He stood in the den area for a minute and then he realized that he could have logically gone, as you can see in the diagram, is out onto the patio. He went out onto the patio and looked in the backyard area, which stretches down from the porch, and he did not see Mr. Hartman. At that point panic and fear started to seize him, and depression. He realized that he had hurt Mr. Hartman and he did not know how bad he had hurt Mr. Hartman. He realized that he had been drinking and that he had violated the rules, and he thought about putting another one of the bullets that he had for the target practicing into the gun and using it on himself. He attempted to load the gun in the same way he had attempted to load it and did load it when he was shooting the cans, and that was by opening the bolt on the gun and just sliding the bullet into the breech. His hand was shaking so badly that he couldn't even get the bullet into the gun, and finally he dropped it – and the evidence will show that it was found right there on the porch, with the bullet still in the gun.

I want to pause here because the physical evidence is also going to show that due to the testimony of the expert from the State Crime Laboratory, that this gun was not jammed – it did not misfire, and there were no misfirings on any cartridges, and that there was no way for this gun to – by loading it in a different fashion – there was no

way for this gun to jam, malfunction, or to have any difficulty. He will also testify that in his examination of this particular bullet in this particular gun, that there were no indications whatever that the bolt had slammed or slid forward in any way or put marks or indentations on that little bullet, as it would have if there had been for example a jam or if there was something wrong, so that the bullet could not be easily placed into the gun. In other words, that weapon was fully operable and fully operational at the time that it was found, and could easily have been used.

Now I am going to go back to the setting on the porch. Roger Hartman is gone and Mr. Brecht doesn't know where he is, or what he is going to do. He things [sic] for a minute and he decides, "I've got to look for Roger, I'm not sure how badly he's hurt." He runs up the stairs and not seeing him in the yard he runs up the stairs and he jumps into the Hartman vehicle and he knew that the keys were probably in the Hartman vehicle because he had used the Hartman vehicle just the day before to go up to Eau Claire, to drive back and now he knew that it was their habit to leave the keys in the car and so he jumped into the car and he started down the road to look for Roger Hartman, very slowly, and he didn't see him anywhere. He speeded up and he drove very rapidly, and he drove around through the area down below the bottom of the yard thinking perhaps Mr. Hartman had gone down the hill and you will see from the evidence that it is a very long sloping yard and that it slopes down and then goes out into a level area and then Highway 37 rounds out behind the back of the yard and then there is another embankment, an area over back of Highway 37. He will

testify that he drove down there and that he looked, and that he came driving back up looking where there was some brush and that he was driving past the house on Riverview Drive where the Hartmans live, and he didn't see Mr. Hartman until he had just approached the driveway coming back to the Hartman home. He was coming back towards the Hartman home and he saw Roger Hartman on the left side of the highway at the Seitz residence, neighbors of Roger and Molly Hartman, and he saw him going into the doorway of that residence and that he was standing up as he went in the doorway. At this point Mr. Brecht again panicked and instead of stopping he realized that Mr. Hartman had help and he realized that he had blown his situation and that he had blown the opportunity that the Hartmans had given him and his only thought was to take off – he didn't care where he went or where he was going or how he was going to get there but he took off in the car and he drove the car down the highway south and he did run the car into the ditch and he did go to Winona and he was there taken into custody by the Winona Sheriff's Department.

* * *

Now I am going to go back to the setting on the porch. Roger Hartman is gone and Mr. Brecht doesn't know where he is, or what he is going to do. He things [sic] for a minute and he decides, "I've got to look for Roger, I'm not sure how badly he's hurt." He runs up the stairs and not seeing him in the yard he runs up the stairs and he jumps into the Hartman vehicle and he knew that the keys were probably in the Hartman vehicle because he had used the Hartman vehicle just the day before to go up to Eau Claire, to drive back and now he knew that it

was their habit to leave the keys in the car and so he jumped into the car and he started down the road to look for Roger Hartman, very slowly, and he didn't see him anywhere. He speeded up and he drove very rapidly, and he drove around through the area down below the bottom of the yard thinking perhaps Mr. Hartman had gone down the hill and you will see from the evidence that it is a very long [sic] down from the porch, and he did not see Mr. Hartman. At that point panic and fear started to seize him, and depression. He realized that he had hurt Mr. Hartman and he did not know how bad he had hurt Mr. Hartman. He realized that he had been drinking and that he had violated the rules, and he thought about putting another one of the bullets that he had for the target practicing into the gun and using it on himself. He attempted to load the gun in the same way he had attempted to load it and did load it when he was shooting the cans, and that was by opening the bolt on the gun and just sliding the bullet into the breech. His hand was shaking so badly that he couldn't even get the bullet into the gun, and finally he dropped it – and the evidence will show that it was found right there on the porch, with the bullet still in the gun.

* * *

DIRECT EXAMINATION OF OFFICER ZELLER

[p. 332] Q Did you speak with this person?

A Yes.

Q What did you say?

A I asked him for his name, and I also asked him if he needed a wrecker, and where he was from.

Q What did he respond?

A He stated his name was Todd Brecht, and he stated that he was from Alma. In reference to the wrecker he said, "My sister will get a wrecker from Alma."

Q Did he say anything else?

A No.

* * *

DIRECT EXAMINATION OF
MELVIN SCHLESSELMAN

* * *

[p. 349] Q At any time during that period of time did he ever ask you to call and [sic] ambulance for anyone?

A No sir.

Q Did he ever ask you to call the police for him?

A No sir.

Q Did he ever mention a Roger Hartman to you?

A No sir.

MR. ZALESKI: I have nothing further.

* * *

CROSS-EXAMINATION OF OFFICER PAPKE
BY DEFENDANT'S COUNSEL

* * *

[p. 363] Q After you had taken him into custody he made a statement to you as you approached the squad car didn't he?

A Yes.

Q In fact he told you that it was a big mistake, he wanted to talk to someone?

[p. 364] A Yes he did.

Q He never explained further to you what he meant by "big mistake", did he?

A No he didn't.

Q Did he ever state to you who it was he wanted to talk to?

A Yes, he wanted to talk to – his words – detectives.

Q And when you got him to the station you did an inventory of what he had on his person is that correct?

A Yes it is.

Q He didn't have other than what you have mentioned in the inventory already, he didn't have any other personal items or personal effects with him?

A Other than those items you wil [sic] find listed on my inventory, no.

Q How much money did he have there?

A (NO ANSWER.)

Q You listed 25¢ on this inventory, is that the only money he had?

A That's the only amount of money that I can recall now.

Q Did he have any checks with him?

A Not that I recall.

Q Did he have any credit cards with him?

A Not that I recall.

* * *

RE-DIRECT EXAMINATION: OF OFFICER PAPKE

BY MR. ZALESKI:

[p. 366] Q Officer Papke did you or anyone else in your presence advise the defendant of his constitutional rights?

A No.

Q Now you stated he said it was a big mistake – did he say what was a big mistake?

A No he didn't.

Q Did he offer any explanation about anything whatever?

A No.

Q All he said was, "This is a big mistake."

A Yes.

Q What was the big mistake, what did you take that to mean?

MR. RIDGEWAY: I object, he is asking for speculation and a conclusion of the witness.

THE COURT: Sustained.

Q Did he say what he was referring to as being a big mistake?

A No.

Q Did he say that the arrest was a big mistake?

MR. RIDGEWAY: Objection, that's been asked and answered.

THE COURT: He may answer it, objection overruled.

[p. 367] A No he didn't.

Q Just that it was a big mistake.

A It was a big mistake.

Q Was he advised as to why he was being taken into custody?

A Yes he was.

Q Again you stated what?

A I told him he was sought by Buffalo County authorities for a shooting incident in Wisconsin.

Q Did he explain anything about a shooting incident to you?

A No he didn't.

Q To anyone else in your presence?

A Not to my knowledge, no.

MR. ZALESKI: I have nothing further.

* * *

CROSS EXAMINATION OF MR. BRECHT
BY MR. ZALESKI

* * *

[p. 605] Q Mr. Brecht, you stated this morning that you've got a few problems, is that not right?

A Yes I do.

Q Homosexuality?

A Yes.

Q Alcoholism?

A Yes.

Q And problems with the truth?

A Yes sir.

Q How long have you had problems with the truth?

A I really can't same [sic], it stems up threw some of my years.

Q You consider yourself a liar?

A At times, yes sir.

Q How long have you been a liar?

[p. 606] A I don't really consider myself a liar, but at times I do lie.

Q What is a liar, sir, is it a person who lies at times?

MR. RIDGEWAY: Objection, argumentative.

THE COURT: Sustained.

Q What is a liar, Mr. Brecht?

MR. RIDGEWAY: Objection, argumentative.

THE COURT: He is entitled to ask him what his definition of it is.

A A liar is somebody who lies all of the time, or doesn't tell the truth all of the time.

Q All of the time, or would a person be a liar if they didn't tell the truth some of the time?

A I guess they would be a liar if they didn't tell the truth some of the time also.

* * *

CROSS EXAMINATION OF MR. BRECHT.

* * *

[p. 617] Q Once you found out they were going to help you, you were going to start making an effort to

better yourself, and were you successful in telling the truth?

A I – probably not, I probably told some lies.

Q Are you still lying?

A Now sir?

Q Yes.

A No sir.

* * *

CROSS EXAMINATION OF MR. BRECHT
BY MR. ZALESKI:

[p. 674] Q Now you ran off the road, and a policeman – excuse me, first you talked to a young lady did you not?

A Yes I did.

Q You asked her for the way, or for a ride to the nearest city?

A Yes I did.

Q Did you tell her that Roger Hartman needed help?

A No.

Q Did you ask her to call an ambulance?

A No I did not sir.

Q Then the next person to show up on the scene is the Chief of Police from Fountain City?

A Yes it was sir.

Q Now you have a law enforcement officer there, is that correct?

A Yes I do sir.

Q I take it at that time you asked him to call an ambulance?

A No I did not sir.

Q You didn't tell him that you had accidently shot Roger Hartman?

A I did not say that, no.

[p. 675] Q You just said that your sister could call a wrecker for you?

A I said something to that effect, I believe so, yes sir.

Q How is [sic] sister going to do that if she is in Rochester, or was that a lie?

A Sir, I was not thinking clearly.

Q Was it a lie?

A Sir . . .

Q Was it a lie, was that a lie to Chief Zeller that you were going to have Molly call a wrecker for you?

A I guess it was.

Q Then you went to Mr. Schlesselman's house?

A I believe that was the gentleman that lived up in the house, yes.

Q You're 27 years did right?

A Yes.

Q And you've been convicted of one crime, and you called Mom –

A I – sir, there's no way to explain what happens when you accidently shoot somebody.

Q I might disagree with that, but we won't get into that at this time. Did you ask Mr. Schlesselman to call you an ambulance –

MR. RIDGEWAY: Objection, and I would [p. 676] move to strike the comment of Mr. Zaleski.

THE COURT: That will be stricken, and the jury will be instructed to disregard.

Q Did you ask Mr. Schlesselman to call an ambulance for Roger?

A No I did not sir.

* * *

[p. 677] Q Then Officer Papke approached you he not?

A I believe that was the officer's name, the officer did approach me, yes.

Q He asked you your name, and you refused to give it [p. 678] to him, is that correct?

A I believe I said, "It's Ron –", and he called my name and I said, "It's Ron, it doesn't matter."

Q Is Ron another alias that you used?

A No.

Q Why did you tell him that your name was Ron?

A I didn't want to get – I didn't want to be taken in by the police, I just wanted to explain to somebody what had happened.

Q Mr. Brecht, there's a law enforcement officer, the second one that you had encountered in about 20 minutes, right?

A I wanted to explain this to somebody that would understand me.

Q Oh I see, it had to be somebody who understood you before you would tell them that you shot Roger.

A I didn't mean it in that sense.

Q What did you mean?

A Somebody that I had known previous, that I had known.

Q You weren't going to tell just anybody that you had shot Roger Hartman and taken off in his wife's car, it had to be somebody who you had known previously?

A Sir, another reason I did not want to be taken into custody, I knew that Roger went through the door and I figured Roger got help sir.

[p. 679] Q You knew that you were in some trouble at this point didn't you?

A I believe so, yes sir.

Q And you were being awfully doggone selected as to who you were going to talk to weren't you?

A I guess I was, yes sir.

Q Chief Zeller didn't meet your criteria, you weren't going to tell him what happened right?

A I didn't say nothing to Mr. Zeller about it, no sir.

Q And I take it that Officer Papke did not meet your criteria, so you said nothing to him?

A I didn't say nothing to him, no sir.

Q So you were contacted by two law enforcement offices within a matter of about 20 or 25 minutes, and you never breathed a word of what happened at the Hartman residence, is that correct?

A No sir, I just said that it was a mistake.

Q You said that later?

A I said that as I was taken out of the mall sir as I recall it.

Q After misidentifying yourself.

A I eventually identified myself.

* * *

[p. 680] Q Later you correctly identified yourself after he did take you into custody?

A We were walking outside of the mall and the gentleman said, "You're Todd Brecht aren't you?" and I said, yes I am, and I believed that he was going to reach for my wallet or get my wallet out, and then I told him who I was.

Q At that time you told him what had happened, is that right?

A No, I did not tell him.

Q Did you ever tell any law enforcement officer that [p. 681] evening what had happened?

MR. RIDGEWAY: Objection your honor. I would like to be heard on that.

THE COURT: I am aware of what the basis of your objection is, and the objection is overruled, he may answer.

Q Did you ever tell any law enforcement officer that evening what had happened?

A I just said it was a mistake, I wanted to talk to somebody is what I said.

Q The place was crawling with cops wasn't it, at the Law Enforcement Center at Winona?

A There was a few officers there, yes.

Q You could have told any one of the officers what had happened.

A Yes I could have sir.

Q But you didn't did you?

A I did not.

Q In fact the first time you have ever told this story is when you testified here today was it not?

MR. RIDGEWAY: Objection your honor.

THE COURT: No, I am going to allow him to answer that question.

A You mean the story of actually what happened?

Q Yes.

[p. 682] A I knew what happened, I'm just telling it the way it happened, yes, I didn't have a chance to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir.

* * *

[p. 720] Q Now regarding your contact while in the holding cell at the Winona Law Enforcement Center, did the jailer check on you?

A I don't know if there was one of those cameras, but I believe that there was a camera, or a window and I believe thta [sic] they checked on me periodically.

Q Did you tell anyone about what had happened in Alma?

A No I did not.

Q Again, with regard to Officer Papke, you told him that you wanted to talk to somebody, and you told Mr. Ridgeway that just a moment ago, but you didn't tell Officer Papke what happened?

A No I did not, I asked to see an attorney once, I remember that.

MR. ZALESKI: Nothing further.

* * *

INSTRUCTIONS TO JURY ON FIRST DEGREE MURDER

[p. 784] First degree murder, as defined in Sec. 940.01 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being with intent to kill that person or another.

Before the defendant may be found guilty of murder in the first degree, the State must prove by evidence which satisfies you beyond a reasonable doubt that there were present the following two elements of this offense:

First, that the defendant intended to kill Roger Hartman.

Second, that the defendant caused the death of Roger Hartman.

Under the Criminal Code, the phrase "intent to kill" means the mental purpose to take the life of another human being. This intent to kill is the element of this offense that distinguishes it from all other degrees of murder. While the law requires, in order to constitute murder in the first degree, that the killing shall have been intended, it does not require that the intent to take human life shall exist for any particular length of time before the crime is committed, or that the killing should have been brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There may be no appreciable space of time between the formation of the intent to kill and the act of killing. If sufficient deliberation was had to form an intent to take life and to put that purpose into execution by destroying life, then there was a sufficient mental purpose to constitute murder in the first degree. The intention to kill, which is an essential

element of murder in the first degree, is no more or less than the mental purpose to take human life, formed on the instant preceding the fatal act or sometime theretofore, and which continued to exist at the time of the fatal act.

[p. 785] Intent to kill must be found as a fact before you can find the defendant guilty of first degree murder. You cannot look into a person's mind to find out his intent. You may determine such intent directly or indirectly from all the facts in evidence concerning this offense. You may consider any statements or conduct of the defendant which indicate his state of mind. You may find intent to kill from such statements or conduct. You are the sole judges of the facts and you must not find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant intended to kill.

Proof of motive to commit a crime is not necessary for a finding of guilt. The State is not required to prove motive, but motive may be considered in determining the guilt of a defendant. Mere proof of motive, on the other hand, does not of itself establish guilt. The presence or absence of motive is to be given just such weight as you believe it deserves.

If you are satisfied beyond a reasonable doubt from the evidence in this case that the defendant did commit an act of shooting which caused the death of Roger Hartman at the time and place charged in the information, and that at any time before doing such act the defendant had formed in his mind the purpose to take the life of Roger Hartman, and that of the act of shooting was

done by the defendant in pursuance of such mental purpose, then you should find the defendant guilty of murder in the first degree as charged in the information.

If you are not so satisfied, you must find the defendant not guilty of first degree murder, and you should consider whether the defendant is guilty of homicide by negligent use of a weapon in violation of Section [p. 786] 940.08 of the Criminal Code of Wisconsin, which is a lesser included offense of first degree murder.

You should make every reasonable effort to agree unanimously on your verdict on the charge of first degree murder before considering the offense of homicide by negligent use of a weapon. However, if after full and complete consideration of the evidence, you conclude that further deliberation would not result in unanimous agreement on the charge of first degree murder, you should consider whether the defendant is guilty of homicide by negligent use of a weapon.

INSTRUCTIONS TO JURY ON HOMICIDE BY NEGLIGENT USE OF A WEAPON

[p. 787] Homicide by negligent use of a weapon, as defined in Sec. 940.08 of the Criminal Code of Wisconsin, is committed by one who causes the death of another human being by a high degree of negligence in the operation or handling of a firearm.

Before the defendant may be found guilty of homicide by negligent use of weapon, the State must prove by evidence which satisfies you beyond a reasonable doubt

that there were present the following two elements of this offense:

First, that the defendant operated or handled a firearm in a manner constituting a high degree of negligence.

Second, that such high degree of negligence on the part of the defendant caused the death of Roger Hartman.

The first element of this offense requires that the defendant operated or handled a firearm in a manner constituting a high degree of negligence. The Criminal code provides that, "A *high* degree of negligence is conduct which demonstrates ordinary negligence to a high degree, consisting of an act which the person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another."

To understand what constitutes a high degree of negligence, you should first consider what is meant by ordinary negligence.

A person is negligent when he fails to exercise ordinary care. Ordinary care is the degree of care which the great mass of mankind ordinarily exercises under the same or similar circumstances. A person fails to exercise ordinary care when, without intending to do any wrong, he does an act or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject the person of another to an unreasonable risk of injury.

[p. 788] The conduct which constitutes "a high degree of negligence" is conduct that not only creates unreasonable risk of bodily harm to another, but also

involves a high probability that substantial bodily harm will result to such other person. "High probability" does not mean that the mathematical probability of the consequences occurring must be greater than 50 per cent. It means simply that the probability would be considered great by the ordinary person, having in mind all the circumstances of the case, including the seriousness of the consequences.

The second element of this offense requires that the defendant's use of the weapon in a manner amounting to a high degree of negligence caused the death of Roger Hartman. This requires that the relation of cause and effect must have existed between the death of Roger Hartman and such negligence on the part of the defendant. Before the relation of cause and effect can be found to exist, it must appear that the defendant's high degree of negligence was a substantial factor in producing the death.

If you are satisfied beyond a reasonable doubt from the evidence in this case that the defendant operated or handled the firearm in a manner constituting a high degree of negligence and that such high degree of negligence on the part of the defendant caused the death of Roger Hartman, then you should find the defendant guilty of homicide by negligent use of a weapon.

INITIAL CLOSING ARGUMENT BY MR. ZALESKI

[p. 791] MR. ZALESKI:

* * *

Now it's time for justice. This case is basically one of credibility. It is a question of who are you going to believe. Are you going to believe the State's case or are you going to believe the story the defendant tried to sell you in a not-so convincing fashion.

Now the State relies on circumstantial evidence. Now [p. 792] one of the big things I always worry about is what we pick up from television and movies and we say, "oh that guy got railroaded, convicted on circumstantial evidence," but you have to remember what the judge said "circumstantial evidence can be stronger than direct evidence at times," and is very competent evidence, and why: because how do you put a case together when there are only two witnesses and one is dead. If that's the case then any criminal, any killer can get by providing there isn't another live witness so you have to rely on circumstantial evidence.

As I said there were two witnesses to this case: the defendant and Roger Hartman, and the defendant killed the other witness.

* * *

[p. 793] The other thing we pick up from television a lot is the concept called motive. I want to talk about that head on because I'm sure a lot of you were thinking as this cased progressed and which came together more at the end: what was the defendant's motive for killing Roger Hartman? How many times did the defendant say,

no matter what you asked him, when you said, "did you call an ambulance," "no, I didn't, because Roger did so much for me." Every time he had a chance to get that shot in about how much Roger did for him, he was doing nothing but trying to sway your judgment, to show that there was no motive to kill Roger Hartman.

Whatis [sic] motive? Basically I think motive is something – it's a reason why somebody does something. Why do you get out of bed in the morning, why do you hold down a job, why do you make the decision to have a family, why do you decide to retire – it's a reason for doing something, however the problems with motive are simply that they are inside the actor's head and there is no way we can look inside of that actor's head and remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence, and there aren't any CAT scans like we use for gall bladders or kidney stones or lungs to look inside of somebody's head to find out motive. We can't get inside of that head. That is specifically the reason why the law recognizes that the State doesn't have to prove a motive in a criminal case. Otherwise there would never [sic] [p. 794] convictions and there wouldn't be a United States, believe me.

* * *

[p. 796] As I said there were two witnesses to this offense, and one can't testify because he's dead but he left behind kind of a legacy of what happened in Todd Brecht. Who are you going to believe: a successful lawyer, businessman, 17 years District Attorney, Colonel in the Air Force Reserve, and a man strong enought [sic] to wage

and conquer a terrible battle against alcoholism that he was able to overcome many years ago.

* * *

[p. 800] Now we look at the defendant's story. I need a drink of water before we get at that one.

It's not unusual to have two glaring conflicts, on two sides of a trial. If there weren't we wouldn't have juries and [p. 801] we wouldn't spend all this money on courtrooms and everything else in criminal trials such as this. There are always two sides to it, otherwise there's no need for a trial. When there's a conflict what's the best thing to do, two things: you look at the demeanor, the way the witness acts on the witness stand in court and then you look at the physical evidence.

Let's look at this. The physical evidence doesn't lie. What is a lie, let's talk about the anatomy of a lie. One thing a person can do when there are certain physical facts, they can come in and deny them or when they're overwhelming you carefully tailor your story to fit with the facts as known to the State, or to anybody else for that matter, but you just give a different interpretation to it and that's specifically what this defendant did. Remember he made no statements to the law enforcement officers, James Zeller or the Winona Police. He sits back here and sees all of our evidence go in and then he comes out with this crazy story, that we're going to get into in some detail.

MR. RIDGEWAY: I think that's improper argument and I would object to it at this point.

THE COURT: It is closing argument, it's a characterization. He is entitled to express an opinion. The jury will make its own evaluation.

MR. ZALESKI: Look at what he said and look at how he [p. 802] acted. A week from Monday, one of my favorite nights of the year because I'm a movie buff, the Acadamy [sic] Awards are going to be one [sic], and I'll tell you right now Whoopie Goldberg for her role in the Color Purple doesn't have to worry about Todd Brecht giving her or anybody else any competition for an Oscar with that performance that he put on on the stand. I especially like the grave attempt to conjure up tears, his constant attempt at sobs up there, but did any of you see a single drop of salt water trickling down his cheeck [sic] – no, but he tried to put on a heck of a show. As I said every time he got a chance to say how wonderful Roger Hartman was he did it, but not a single tear no matter how hard he tried. Of course he only tried on direct examination, not cross-examination.

You know the funny thing about Mr. Brecht is, as bad as his credibility is, the only truthful thing he said this entire week is that he's a lier [sic]. That's kind of unusual isn't it. Todd Brecht had more stories to tell us than Imelda Marcos has shoes, folks, and it was destroyed immediately.

* * *

[p. 816] The police finally apprehend him in Winona, and does he say he's Todd Brecht, no. He says his name is Ron and it doesn't matter. Who is he talking to, mom. "Ron, it doesn't matter." He's just put a bullet hold through the back of the District Attorney and he won't

even identify himself to the Police. He'd rather let Roger crawl around with a gaping hole in his vena cava than even tell his name, or get any help for him. That's the type of guy Todd Brecht is.

He was on probation and he admits he wasn't supposed to leave the State and yet he left the State.

Now he's with Officer Papke and he tells him nothing, [p. 817] he's talking to mom, his name is Ron, and he finally gives his identity after Officer Papke says, "look buster we're going to find out no matter what.

Now he was then taken into Winona and they then find the 14 rounds of ammunition on him, and Officer Polus says he hears him talking on the phone to his step father, "it was a mistake, it was an accident, I didn't murder anyone." Why murder – a Freudian slip.

Mr. Ridgeway brought out the fact that he said he wanted to talk to somebody. Sure he wanted to talk to somebody. That's the sort of guy Todd Brecht is. He always wants to talk to somebody, until the opportunity presents itself. What did Officer Polus say he said, "I can't talk any more, there are a bunch of cops here." Who was he going to talk to. Remember who he would talk to, "someone who would understand." Here's a guy who's filled with problems, and we have to get the special cop who can understand Todd before he'll tell them that he just pumped a bullet through his brother-in-law. He can't tell anybody else. Todd's always a little special, he's "Peter Carrington."

* * *

[p. 822] Folks, just one last thing I want to talk to you aboutbefore [sic] I sit down. Roger Hartman's murder, he's charged with [p. 823] that, murder in the 1st degree. The court has also given you instructions on the lesser crime – the lesser crime of homicide by negligent use of a weapon. I want to look every one of you in the eye and tell you something: the State of Wisconsin, the people of the State of Wisconsin, don't want any verdict on Homicide by Negligent use of a Firearm.

Mr. Ridgeway and Mr. Brecht wouldn't mind that because it's a compromise verdict, it gives you an out . . .

MR. RIDGEWAY: I object to it as being characterized as that.

THE COURT: No, he can argue it, it's the jury that makes the decision.

MR. ZALESKI: It is nothing more than a compromise verdict. Maybe you'll be eight to four after a couple of hours, maybe ten to two, and you're getting tired and you say, "let's give him the lesser offense, he's a pathetic person," don't fall for that, don't fall for that please.

First of all as far as the State is concerned there is absolutely no basis on which to convict this man of that offense. If you believe his story I want him to talk [sic] out of this courtroom this afternoon a free man. I don't want any lesser crime. And think of what the judge instructed you on Homicide by Negligent use of a Firearm: it can't be just simple negligence, it has to be severe negligence, conduct resulting in [p. 824] a high probability of death or great bodily harm.

Are we going to penalize Mr. Brecht for having a bad foot. He carried the gun in like anyone would who was rational, muzzle up – yeah it was loaded, and I don't know how many of you folks are hunters but maybe you come home with the gun still loaded. It's not a good idea, but if you do, or you're working at it, and you carry it in the house, you carry it in in a safe position like this with the muzzle up, but because he's got a bad foot and he stumbles and it goes off should we make him a criminal. No, let him go. I want him out of this courtroom today if that's going to be your verdict. You know why, because that is not the way it should be. He committed this murder with deliberation and premeditation, for whatever reasons went through his mind. It's a clear-cut case of 1st degree murder and he's tried to sell you a real bill of goods with this story that he's come up with.

* * *

FINAL CLOSING ARGUMENT BY MR. ZALESKI

[p. 879] First of all there has not been a single piece of independent evidence received to corroborate anything Todd Brecht said from that witness stand. It is his cockamamie story that he wants you to believe and which is carefully woven as I said before, to fit in with all the State's evidence.

* * *

[p. 880] A 27 year old man acted like that and he wants you to believe that and exonerate him from this 1st

degree murder based on that story. There is no other evidence other than his story as part of the defense, nothing.

* * *

[p. 887] That reference to the "plan in Atlanta." I never meant to infer and I don't know where Mr. Ridgeway got that idea that they had a scheme to kill Roger Hartman, he and Mason. I never meant that. I don't know what this plan was in Georgia, and he obviously didn't tell us but the fact of the matter is from day one he was using the Hartmans.

* * *

[p. 888] He said he wanted to talk to the detectives. Well Polus and Papke weren't good enough. Seven guys on the Buffalo County Sheriff's Department, two of them are there with a warrant and does he say anything? Mr. Ridgeways said, "what would you say?" I know what I'd say, I'd say "hold on, this was a mistake, this was an accident, let me tell you what happened," but he didn't say that did he. No, he waited until he hears our story.

* * *

[p. 889] Folks I just want to pose a couple of questions to you: why did he violate his probation and run to Minnesota; why didn't he stop to help Roger and administer first aid; why didn't he call an ambulance; why didn't he run and get help from the neighbors; why didn't he tell Chief Zeller about this; why didn't he tell Melvin Schesselman about it; why did he carry the gun outside; why would Roger crawl away, and not let Brecht help him? If you were shot and this was an accident,

wouldn't you want the closest person to help you? Why would Roger yell not to let Grant and Molly near him? How could he trip on nothing; why would he lie to Chief Zeller about getting his sister to call a wrecker; why would he lie to [p. 890] Mr. Schesselman about where he was from and where he was going; how could Roger Hartman know it was a .22 calibur [sic] rifle – rifle mind you, unless he saw it; why would he be firing that gun at that time when he knows Roger is due home, when he knows what time when Roger gets home; why would a 27 year old person panic to that extent; why didn't he tell the Police about it being an accident; why did he refuse to identify himself to the Winona Police Department – I'll tell you why, because Todd Brecht is a murderer, a murderer in the first degree and we have to face up to it.

* * *

138 Wis.2d 158
STATE of Wisconsin.
Plaintiff-Respondent,

v.

Todd A. BRECHT, Defendant-Appellant.

No. 86-1317-CR.

Court of Appeals of Wisconsin.

Submission on Briefs Jan. 16, 1987.

Opinion Released March 17, 1987.

Opinion Filed March 17, 1987.

Review Granted.

Before CANE, P.J., and LaROCQUE and MYSE, JJ.

MYSE, Judge.

Todd Brecht appeals a judgment convicting him of first-degree murder with the use of a dangerous weapon, contrary to secs. 940.01 and 939.63(1)(a), Stats. Brecht argues that his conviction should be overturned because the state's comments on his post-arrest silence violated his constitutional right to due process of law and his privilege against self-incrimination. Additionally, Brecht contends that the trial court erred by admitting evidence of his homosexuality and concluding that should he introduce evidence of his nonviolent character, the state could introduce evidence of his prior worthless check convictions.[1] We agree that the state's comments on

[1] Brecht also argues that his conviction should be reversed because of the prosecutor's alleged prosecutorial misconduct. Because Brecht's conviction must be reversed on other grounds, we need not address this issue. *See State v. Hurd*, 135 Wis.2d 266, n. 5, 400 N.W.2d 42, n.5. (App.Ct. 1986).

Brecht's silence impermissibly infringed on his right to a fair trial and that the trial court erred in its evidentiary rulings. The judgment is reversed.

In 1985, Brecht was convicted in Georgia of felony theft. In October of that year, Brecht's sister, Molly Hartman, and her husband, Roger Hartman, paid the restitution imposed for Brecht's crime and obtained his release from jail and the transfer of his probationary supervision to Wisconsin. The Hartmans brought Brecht back to Alma, Wisconsin, to live with them until he could be placed in a halfway house.

On October 17, Brecht shot and mortally wounded Roger Hartman. Brecht fled the scene and did not summon medical assistance or attempt to aid Hartman. Later that day, Brecht was taken into custody in Winona, Minnesota, and was told that he was being held in connection with a shooting incident in Wisconsin. Brecht responded that "it was a big mistake" and thereafter remained silent.

Brecht was ultimately charged with first-degree murder. At trial, Brecht testified that on the day of the incident, he had been using one of Hartman's guns to shoot at a soda can. Brecht stated that when he saw Hartman pulling into the driveway, he ran into the house to replace the gun but tripped and fell causing the gun to discharge. Hartman was struck in the back. Brecht testified that the shooting was accidental and that he did not intend to harm Hartman.

Over defense counsel's objections, the prosecutor during cross-examination repeatedly questioned Brecht as to why he had not informed the arresting authorities that the shooting was accidental. With regard to Brecht's

silence when first taken into custody, the prosecutor asked:

> Q. And you were being awfully dog-gone selective [sic] as to who you were going to talk to weren't you?
>
> A. I guess I was, yes sir.
>
> . . . .
>
> Q. And I take it that Officer Papke did not meet your criteria, so you said nothing to him?
>
> A. I didn't say nothing to him, no sir.
>
> Q. So you were contacted by two law enforcement officers within a matter of about 20 or 25 minutes, and you never breathed a word of what happened at the Hartman residence, is that correct?
>
> A. No sir, I just said that it was a mistake.

Referring to Brecht's silence while being held by the Winona police, the prosecutor asked:

> Q. At that time you told him what had happened, is that right?
>
> A. No, I did not tell him.
>
> . . . .
>
> Q. Did you ever tell any law enforcement officer that evening what had happened?
>
> A. I just said it was a mistake, I wanted to talk to somebody is what I said.
>
> Q. The place was crawling with cops wasn't it, at the Law Enforcement Center at Winona?

> A. There were a few officers there, yes.
>
> Q. You could have told any one of the officers what had happened.
>
> A. Yes, I could have sir.
>
> Q. But you didn't did you?
>
> A. I did not.
>
> Q. In fact the first time you have ever told this story is when you testified here today was it not?
>
> . . . .
>
> A. You mean the story of actually what happened?
>
> Q. Yes.
>
> A. I knew what happened, I'm just telling it the way it happened, yes, I didn't have a change to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir.

Again, on its recross-examination of Brecht, the prosecutor questioned:

> Q. Did you tell anyone about what had happened in Alma?
>
> A. No. I did not.
>
> Q. Again, with regard to Officer Papke, you told him that you wanted to talk to somebody, . . . but you didn't tell Officer Papke what happened?
>
> A. No, I did not. . . .

In its closing argument, the state urged the jury to "remember that Mr. Brecht never volunteered until in this

courtroom what happened in the Hartman residence . . . he made no statements to the law enforcement officers . . . [h]e sits back here and sees all of our evidence go in and then he comes out with this crazy story. . . . " In its closing argument on rebuttal, the state asserted, "I know what I'd say, I'd say 'hold on, this was a mistake, this was an accident, let me tell you what happened' but he didn't say that did he. No, he waited until he hears our story."

Brecht argues that the state's comments on his post-arrest silence violated his constitutional right to due process of law and against self-incrimination guaranteed under the fifth and fourteenth amendments to the United States Constitution and art. I, sec. 8, of the Wisconsin Constitution. Each stage of Brecht's silence must therefore be analyzed in a constitutional light.

PRE-ARREST, PRE-MIRANDA SILENCE

As a starting point, we note that because no governmental action was involved, comments on Brecht's pre-arrest, pre-*Miranda* silence were permissible. *Jenkins v. Anderson*, 447 U.S. 231, 239-40, 100 S.Ct. 2124, 2129-30, 65 L.Ed.2d 86 (1980). Thus, the state could properly question Brecht, and comment to the jury, on his failure to aid Hartman or summon medical assistance, and his flight from the scene.

POST-ARREST, PRE-MIRANDA SILENCE

In *Fletcher v. Weir*, 455 U.S. 603, 606-07, 102 S.Ct. 1309, 1311-12, 71 L.Ed.2d 490 (1982), the United States Supreme

Court held that the states may adopt their own rules as to whether it is permissible to comment on a defendant's post-arrest, pre-*Miranda* silence. The Court reasoned that this inquiry did not violate due process because the defendant's silence was not induced by *Miranda* warnings informing him of his right to remain silent and implicitly assuring him that his silence would not be used against him. *Id.*

This reasoning seems predicated upon the dubious proposition that a defendant only invokes his right to remain silent after he is formally advised of his right. In a modern society with mass communications publicizing a defendant's constitutional right to remain silent, it is at least an arguable assumption that by remaining silent a defendant is relying upon his constitutional right to do so, even though he has not been formally advised of it. Regardless, this issue may be determined by each state under its own laws and constitution.

Our supreme court has indicated that comments on a defendant's post-arrest, pre-*Miranda* silence are impermissible. *See State v. Fencl*, 109 Wis.2d 224, 236-37, 325 N.W.2d 703, 710-11 (1982); *Reichoff v. State*, 76 Wis.2d 375, 378-80, 251 N.W.2d 470, 472-73 (1977). Because this holding rests upon a defendant's privilege against self-incrimination as guaranteed under the fifth amendment and art. I, sec. 8, of the Wisconsin Constitution, it is unaffected by the due process analysis employed in *Fletcher*. Any change from this position must properly emanate from our supreme court. *State v. Grawien*, 123 Wis.2d 428, 432 367 N.W.2d 816, 818 (Ct.App.1985).

On cross-examination, the state repeatedly questioned Brecht on his silence following his arrest and detention by the Winona authorities. The state not only commented on Brecht's silence, but vigorously argued that this silence was evidence that Brecht fabricated the accidental shooting story after the state had introduced all of its evidence. These comments on Brecht's post-arrest, pre-*Miranda* silence were impermissible. *See Fencl*, 109 Wis.2d at 236-37, 325 N.W.2d at 710-11.

The state attempts to justify its comments on Brecht's silence by claiming that he opened the door to such inquiry by testifying that he wanted to talk to someone about what happened and that "it was a mistake." It is true that a defendant's own testimony may permit the prosecutor to question him about his silence. *United States v. Shaw*, 701 F.2d 367, 384 (5th Cir.1983), *cert. denied*, 465 U.S. 1067, 104 S.Ct. 1419, 79 L.Ed.2d 744 (1984). Brecht's statements, however, were made in response to the state's repeated questioning as to why he had never told any law enforcement officer that the shooting was accidental. In the face of such questions, it cannot be said that Brecht's responses permitted further inquiry, but, rather, that Brecht's statements were solely the result of improper questioning on his silence.

Because we conclude that the state's comments on Brecht's post-arrest, pre-*Miranda* silence were constitutional error, we must next determine whether that error was harmless beyond a reasonable doubt. *Fencl*, 109 Wis.2d at 238, 325 N.W.2d at 711. A court may find a constitutional error harmless if there is no reasonable possibility that the error contributed to the conviction. *Id.* In making this determination, a court applies a three-

pronged test that examines the frequency of the error, the nature of the state's evidence, and the nature of the defense. *Id.*

The frequency of the error involves not just a numerical computation but an examination of the comments within the context of the entire trial. The state asserts that the error was not prejudicial because, although the trial transcript totaled more than 900 pages, there were "only" three brief references in closing argument and inquiry during cross- and recross-examination of less than three pages. The question of prejudice, however, is not so easily answered.

The state's reference to Brecht's silence in both cross- and recross-examination went far beyond a simple inquiry as to his silence but involved a detailed recitation as to the various opportunities he had to explain the accident to a number of officer. This questioning led Brecht to testify that he wished to explain what had happened and the state's further exploration as to why he did not explain. Based upon the nature and length of the state's comments on Brecht's silence, and the vigorous nature in which his silence was argued as proof of his fabrication of an accidental shooting, we conclude that, under the frequency test, prejudice existed.

The second inquiry involves the nature of the state's evidence against Brecht. The state presented overwhelming and uncontradicted evidence the Brecht shot Hartman and caused his death. The disputed and ultimate issue was Brecht's intent at the time of the shooting. On this issue, the state relied entirely on circumstantial evidence. Accordingly, the state's comments on Brecht's failure to

inform the authorities that the shooting was accidental was highly prejudicial and may have unduly influenced the jury.

The final test for harmless error concerns the nature of the defense. Brecht contended that the shooting was accidental. His testimony regarding the circumstances of the shooting and his intentions at that time raised the issue of his credibility to a critical level. The state's argument that Brecht's silence was inconsistent with his testimony, and its use of his silence as an attack on his credibility, also contributes to the danger that Brecht was prejudiced by this error.

POST-ARREST, POST-MIRANDA SILENCE

Whatever latitude the state may have in regard to commenting on a defendant's post-arrest, pre-*Miranda* silence, no such latitude exists in regard to silence following arrest and *Miranda* warnings. Such silence is constitutionally protected, and any comment thereon violates a defendant's due process right to a fair trial. *Wainwright v. Greenfield*, 474 U.S. 284, 106 S.Ct. 634, 638-39, 88 L.Ed.2d 623 (1986).

It is unclear from the record whether Brecht was informed of his *Miranda* rights when first taken into custody. The record does demonstrate, however, that Brecht was informed of these rights at his initial court appearance. The state's assertions in closing arguments that Brecht first volunteered his accidental shooting story after the state had presented its evidence were comments

on Brecht's post-*Miranda* silence. Those comments violated Brecht's right to due process of law. *See Wainwright*, 106 S.Ct. at 638-39.

The prosecutor's comments on Brecht's post-arrest, post-*Miranda* silence were also prejudicial. Although the comments were infrequent, Brecht's credibility was undermined by the prosecutor's suggestion that his continued silence was proof that he had fabricated the accidental shooting story after hearing the state's evidence against him. In a first-degree murder prosecution in which intent is established solely by circumstantial evidence and the defendant's credibility is a critical issue, impermissible comments that attack credibility heighten the danger or prejudice. *See Reichoff*, 76 Wis.2d at 381-82, 251 N.W.2d at 473-74. Because the defense relied heavily upon Brecht's credibility and because the prosecutor's comments were clearly improper, we conclude that the comments on Brecht's post-arrest, post-*Miranda* silence were prejudicial.

In summary, we conclude that the state's comments on Brecht's silence constituted prejudicial error. We therefore conclude that Brecht's conviction must be reversed.

Brecht contends that his conviction should be reversed on several other grounds. Because addressing these issues may be helpful on any retrial, we will examine these contentions.

Brecht argues that the trial court erred by admitting evidence of his homosexuality. The admission of this evidence was predicated upon Hartman's disapproval of Brecht's lifestyle and his communication of this feeling to

Brecht. An argument between the two concerning Hartman's attitude would provide Brecht with a possible motive to shoot Hartman. The state expected Hartman's wife, Molly, to testify that Hartman had informed Brecht of his feelings concerning Brecht's lifestyle. During the trial, however, Molly specifically denied that Hartman had ever communicated his disapproval of Brecht's homosexuality to Brecht.

We recognize that a trial court has broad discretion in determining the relevancy and admissibility of proffered evidence. *State v. Pharr,* 115 Wis.2d 334, 342-45, 340 N.W.2d 498, 501-03 (1983). A trial court's determination of relevancy will be upheld unless it constitutes an abuse of discretion. *Id.* at 342, 340 N.W.2d at 501. A reviewing court will not find an abuse of discretion if there is a reasonable basis for the trial court's determination. *Id.*

Although evidence of motive is not an element of the crime charged, it is admissible if it meets the relevancy standards of sec. 904.01, Stats.[2] *State v. Phillips,* 99 Wis.2d 46, 54, 298 N.W.2d 239, 243 (Ct.App. 1980). This statute has been interpreted to mean that any fact that tends to prove a material issue is relevant. *Pharr,* 115 Wis.2d at 344, 340 N.W.2d at 502.

Here, evidence of Brecht's homosexuality was irrelevant. Although it is true that one of the conditions of Brecht's remaining in the Hartman home was that he not

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[2] Section 904.01 defines relevant evidence as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

engage in homosexual conduct, the imposition of such a rule approximately one week prior to the shooting fails to establish a motive for murder. If the evidence had established a connection between Brecht's lifestyle and motive, admitting evidence of Brecht's homosexuality may have been justified. In the absence of such evidence, evidence of Brecht's homosexuality was not probative of motive or any other material issue underlying the crime charged. Irrelevant evidence should not be admitted. Section 904.02, Stats. Accordingly, we conclude that the trial court erred by admitting this evidence.

Brecht also contends that the trial court erroneously determined that the state court introduce evidence of his prior worthless check convictions should he open the door to this evidence. During the trial, Brecht advised the court that he intended to call his probation officer, Mrs. Rusch, to testify as to her opinion of his nonassaultive, nondangerous character. A defendant may introduce character evidence of nonviolence. *King v. State,* 75 Wis.2d 26, 38-39, 248 N.W.2d 458, 464-65 (1977); sec. 904.04(1)(a), Stats. The court ruled that should such evidence be introduced, it would permit the state to cross-examine Rusch concerning Brecht's worthless check convictions.

A cross-examination of Rusch concerning Brecht's worthless check convictions is totally unrelated to the question of a character trait of nonviolence. The court therefore erred by declaring that Rusch's testimony would open the door to a detailed recitation of Brecht's prior convictions. *See* sec. 90405(1), Stats.

Judgment reversed.

Supreme Court of Wisconsin.

143 Wis.2d 297

STATE of Wisconsin,
Plaintiff-Respondent-Petitioner,

v.

Todd A. BRECHT, Defendant-Appellant.

No. 86-1317-CR.

Argued Dec. 2, 1987.

Decided March 23, 1988.

BABLITCH, Justice.

The State of Wisconsin (State) seeks review of a court of appeals' decision, *State v. Brecht*, 138 Wis.2d 158, 405 N.W.2d 718 (1987), that reversed the judgment of conviction for first degree murder entered against Todd A. Brecht (Brecht) by the circuit court for Buffalo county, Judge Peter G. Pappas. The court of appeals based its reversal on the grounds that references to Brecht's pretrial silence during cross-examination and during the State's closing argument impermissibly infringed on Brecht's constitutional rights to silence and to a fair trial, and that such errors were prejudicial.

While we agree that some of the State's references to Brecht's silence were constitutional error, we hold that such error was harmless. In considering the other issues raised on appeal, we conclude that the circuit court properly exercised its discretion in admitting evidence of Brecht's homosexuality because such evidence may have been relevant to the issue of motive. However, the circuit court erred in ruling that the State could cross-examine

Brecht's character witness about Brecht's prior convictions. Nonetheless, we conclude that Brecht was not prejudiced by this error. Accordingly, we reverse the decision of the court of appeals.

On October 17, 1985, Brecht shot and wounded his brother-in-law, Roger Hartman (Hartman), who was the district attorney for Buffalo county, Wisconsin. Hartman died several weeks later. Brecht was arrested on the day of the shooting and subsequently tried by jury. He argued at trial that the shooting was accidental. The jury, however, found him guilty of the first degree murder of Hartman. The following facts are relevant to this appeal.

On October 12, 1985, Molly and Roger Hartman went to the Georgia State prison to secure the release of Molly Hartman's younger brother, Brecht. At that time, Brecht was imprisoned after conviction for a felony theft of $3,750. His release from prison and placement on probation were conditioned on payment of $3,750 in restitution for his theft. The Hartmans paid his restitution and obtained his release and the transfer of his probation to Wisconsin. The conditions of Brecht's probation, as stated in defense counsel's brief, consisted of the following: "1) not violating the law of any government; 2) avoiding injurious and vicious habits – especially alcoholic intoxication, and; 3) not leaving the State without permission."

The Hartmans brought Brecht to their home in Alma, Wisconsin, where he was to stay until an opening in an Eau Claire halfway house became available. The Hartmans told Brecht that while he lived in their home he was to refrain from homosexual activity in the Alma area and from drinking.

Brecht testified that on the day of the shooting he had been drinking and playing with a gun that belonged to Roger Hartman while the latter was at work and Molly Hartman was out shopping. Brecht had been using the gun to shoot at tin cans in the Hartman's yard. After firing the gun, Brecht testified that he saw Roger Hartman pull into the driveway. Because Brecht did not want Hartman to see him with the gun, he ran into the rear garage and entered a downstairs hallway. Brecht explained that he intended to replace the gun in the upstairs room where he had found it.

With the gun in hand, Brecht stopped to listen for Hartman. Hearing nothing, Brecht testified that he started running for the stairs to the upper level when he tripped and the gun discharged. A bullet struck Hartman in the back.

Brecht yelled to Hartman and looked for him but Hartman had disappeared. Brecht then took Molly Hartman's car and drove around the area searching for Hartman. Upon spotting Hartman at the door of a neighbor's house, Brecht drove off in the car. The Hartman car was observed traveling at a faster than normal speed away from Alma and towards Fountain City.

Neighbors of the Hartmans testified that Roger Hartman had come to their house seeking help and told them that Brecht had shot him. Police officers who had surveyed the Hartman residence after the shooting, testified that they had found beer cans in the house, and a liquor bottle and a soda can with a bullet hole in it and spent .22 casing in the backyard. Experts from the State Crime Laboratory testified that Brecht's fingerprints were on an

ammunition box and on a brandy bottle found in the Hartman home. Additionally, it was noted that the doorway area leading into the hallway from the garage was covered with tightly stretched carpet and that nothing was observed on which one could trip.

Meanwhile, Brecht had driven the Hartman car into a ditch near Fountain City, rendering the car inoperable. Officer Zeller arrived and offered Brecht assistance with the car, but Brecht told Zeller that his sister would call a wrecker for him. Brecht subsequently obtained a ride from a stranger, Melvin Schlesselman, to the nearest town, Winona, Minnesota. He did not mention the shooting incident to either Schlesselman or Zeller.

In Minnesota, Brecht was stopped by the Winona police in a shopping center. He falsely identified himself and when his true identity was ascertained, he was arrested by the police for the shooting of Hartman in Wisconsin. Brecht told officer Papke, one of the arresting officers, that it was a mistake and that he wanted to talk with "somebody that would understand [him]." However, neither Brecht's testimony nor that of the police officers' indicate that Brecht explained the shooting incident upon arrest.

The record is unclear when Brecht received his *Miranda* warnings. The State submitted testimony by two of the five officers involved in the arrest, who testified that Brecht was not given his *Miranda* warnings in their presence. However, the record does reflect that Brecht did receive his *Miranda* warnings at his initial appearance.

On November 11, 1985, Hartman died. A coroner testified that the bullet wound was a substantial factor in

producing his death. He also testified that the bullet which entered Hartman's back and exited his chest, traveled on a basically horizontal to slightly downward trajectory.

At trial, the State questioned Zeller, Schlesselman and Papke during its case-in-chief about Brecht's failure to mention Hartman's condition and the accidental nature of the shooting. Additionally, the State attempted to directly impeach Brecht's credibility by cross-examining Brecht on his pre-trial silence concerning the shooting and by making reference to his silence during closing argument.

The State also sought to introduce evidence of Brecht's homosexuality to establish a possible motive for the shooting. The circuit court permitted the introduction of such evidence, over Brecht's objection, noting its relevancy to the issue of motive. During trial, the State produced letters Brecht had written to an inmate in the Georgia prison where Brecht had been incarcerated. The State alleges that one of the letters contained homosexual overtones, a fact Brecht disputes. Additionally, the State elicited testimony from Molly Hartman on Brecht's homosexuality. Molly Hartman testified at trial that her husband had disapproved of Brecht's homosexuality. However, she gave conflicting testimony as to whether her husband had communicated this disapproval directly to Brecht.

Brecht sought to call his probation officer to testify about Brecht's non-violent character. The circuit court ruled that the introduction of such evidence would also permit the State to cross-examine the officer about

Brecht's conviction for writing worthless checks. Consequently, Brecht chose not to call his probation officer and rested his case.

Additionally, both parties stipulated to the filing of ex parte briefs to the court. These briefs were subsequently filed in open court.

The jury found Brecht guilty of first degree murder by use of a dangerous weapon. He was sentenced to life in prison with penalty enhancement for use of a dangerous weapon and for being a repeat offender. Brecht appealed the judgment of conviction.

The court of appeals reversed the conviction on the grounds that the State's references to Brecht's silence impermissibly infringed Brecht's right to silence and to a fair trial, and that such references were prejudicial. The court further concluded that the circuit court erred in admitting evidence of Brecht's homosexuality and in ruling that the State could cross-examine the probation officer on Brecht's worthless checks conviction.

The State subsequently filed a petition to review with this court, seeking reversal of the court of appeals' decision. The petition was granted on July 29, 1987.

The central question presented on review is whether Brecht's constitutional rights to silence[1] and to a fair trial

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[1] Although Art. I, Sec. 8 of the Wisconsin Constitution and the Fifth Amendment of the United States Constitution do not expressly include the phrase "right to silence," that phrase has become a shorthand for describing the rights encompassed within the privilege against compelled self-incrimination and is used in that sense throughout this opinion.

were violated by the State's references to his silence. The references at issue include: 1) elicitation of evidence on Brecht's pre-*Miranda* silence during the State's case-in-chief, 2) references to Brecht's pre-*Miranda* silence after Brecht elected to testify, and 3) comments on Brecht's post-*Miranda* silence during the State's cross-examination of Brecht and closing argument. If such references were constitutional error, we must also determine whether the error was harmless beyond a reasonable doubt. Brecht asserts that references to his silence in all three contexts were constitutional error and prejudicial.

We first consider Brecht's claim that the elicitation of evidence on his silence during the State's case-in-chief violated his right to silence secured under Art. I, Sec. 8 of the Wisconsin Constitution and the Fifth Amendment of the United States Constitution. The references challenged by Brecht consist of testimony elicited from three State witnesses, officer Zeller, Melvin Schlesselman, and officer Papke, during the State's case-in-chief.[2] Because the record does not reflect that Brecht received his *Miranda* warnings until his initial appearance, we treat this testimony as references to Brecht's pre-*Miranda* silence.

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[2] Brecht also objects to the following testimony elicited from deputy Bratner during the State's case-in-chief:

"Q. Did you arrest the defendant?

"A. I served the arrest warrant on him, yes.

"Q. Did you give him Miranda warning?

"A. No."

We conclude that this testimony does not constitute a reference to Brecht's silence and, therefore, do not consider it in our analysis.

The first reference to Brecht's silence was elicited from officer Zeller, the officer who spoke with Brecht when his car was in the ditch.

"Q. Did you speak with this person [Brecht]?

"A. Yes.

"Q. What did you say?

"A. I asked him for his name, and I also asked him if he needed a wrecker, and where he was from.

"Q. What did he respond?

"A. He stated his name was Todd Brecht, and he stated that he was from Alma. In reference to the wrecker he said, 'My sister will get a wrecker from Alma.'

"Q. Did he say anything else?

"A. No."

Brecht asserts that the State made a similar inquiry into his silence on direct examination of Melvin Schlesselman, the individual who gave Brecht a ride to Winona, Minnesota. Schlesselman testified on direct examination by the State:

"Q. At any time during that period of time did he ever ask you to call and (sic) ambulance for anyone?

"A. No sir.

"Q. Did he ever ask you to call the police for him?

"A. No sir.

"Q. Did he ever mention a Roger Hartman to you?

"A. No sir."

Lastly, Brecht objects to the testimony elicited during the State's examination of officer Papke on redirect. Papke was one of the officers who apprehended Brecht in Winona for the shooting.

"Q. Officer Papke did you or anyone else in your presence advise the defendant of his constitutional rights?

"A. No.

"Q. Now you stated he said it was a big mistake – did he say what was a big mistake?

"A. No he didn't.

"Q. Did he offer any explanation about anything whatever?

"A. No.

". . . .

"Q. Was he advised as to why he was being taken into custody?

"A. Yes he was.

"Q. Again you stated what?

"A. I told him he was sought by Buffalo County authorities for a shooting incident in Wisconsin.

"Q. Did he explain anything about a shooting incident to you?

"A. No he didn't.

"Q. To anyone else in your presence?

"A. Not to my knowledge, no."

To ascertain whether these references violated Brecht's constitutional right to silence, we must examine the nature of the right and when it attaches. The proscription against use of a defendant's silence is derived from the privilege against self-incrimination found in art. I, Sec. 8 of the Wisconsin Constitution. *See Rudolph v. State*, 78 Wis.2d 435, 442 254 N.W.2d 471 (1977) (per curiam), citing, *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). This privilege, also guaranteed under the Fifth Amendment of the United States Constitution, provides that "[n]o person may be . . . compelled in any criminal case to be a witness against himself or herself." Wisconsin Const. Art. I, Sec. 8. The United States Supreme Court has broadly construed the fifth amendment privilege to prohibit compelled self-incrimination not only in criminal proceedings but "in all settings in which . . . freedom of action is curtailed in any significant way. . . . " *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966).

As a corollary to the fifth amendment privilege, the Supreme Court has recognized an individual's right to remain silent and not have the exercise of his or her fifth amendment privilege used by the prosecution at trial. In *Miranda*, the Court noted that the prosecution may not use at trial the fact that a defendant stood mute or claimed his privilege in the face of accusation. *Miranda*, 384 U.S. at 486 n. 37, 86 S.Ct. at 1624 n. 37. Similarly, in *Griffin*, the Supreme Court held it was constitutional error for the prosecution to use a nontestifying defendant's

silence against him at trial. *Griffin*, 380 U.S. 609, 85 S.Ct. at 1229. To allow otherwise, the Court reasoned, would penalize the defendant for the exercise of his privilege and erode its protections by making the assertion of the privilege costly. *Id.* at 614, 85 S.Ct. at 1232.

Consistent with this precedent; this court has held that it is a violation of the right to remain silent for the State to present testimony in its case-in-chief on the defendant's election to remain silent during a custodial investigation, after arrest. *Rudolph*, 78 Wis.2d at 442, 254 N.W.2d 471. Further, in *Reichhoff v. State*, 76 Wis.2d 375, 251 N.W.2d 470 (1977), we acknowledged that the right to silence attaches at the time of a defendant's arrest, even though no police interrogation or questioning occurs. *Id.* In that case, we held that it was constitutional error for the State to elicit testimony during its case-in-chief on the defendant's silence upon arrest. Such testimony included statements from an arresting officer that the defendant, "just put his wrists out . . . for the handcuffs and never said a word." *Id.* at 377 n. 1, 251 N.W.2d 470.

More recently, in *State v. Fenel*, 109 Wis.2d 224, 325 N.W.2d 703 (1982), we recognized that the right to silence also attaches when an individual is being questioned by the police, prior to arrest and receipt of *Miranda* warnings. *Id.* In *Fenel*, the State had violated the defendant's constitutional rights by referring to the defendant's pre-arrest, pre-*Miranda* silence in its case-in-chief. As we stated,

> "Any time an individual is questioned by the police, that individual is compelled to do one of two things – either speak or remain silent. if both a person's prearrest speech and silence

> may be used against that person, as the state suggests, that person has no choice that will prevent self-incrimination. This is a veritable 'Catch-22.' . . . We hold that a person is entitled to the protection of the Fifth Amendment even prior to arrest or a custodial interrogation." *Id.* at 237, 325 N.W.2d 703.

Brecht asserts that *Fenel* dictates that all reference to pre-*Miranda* silence violates the protections of the privilege against compelled self-incrimination. Therefore, he maintains that the State's elicitation of testimony on his pre-*Miranda* silence from Schlesselman and Zeller was constitutional error. However, the defendant's silence in *Fenel* occurred prior to his arrest and receipt of *Miranda* warnings, and at a time when the defendant was being questioned by police during a murder investigation. To conclude that Brecht's silence during his encounters with both men was constitutionally protected would extend the right to silence to circumstances beyond those presented in *Fenel*. We decline to so hold.

Rather, we conclude that Brecht's right to silence was not implicated in his encounters with Schlesselman and Zeller. A reasonable person in Brecht's position would not conclude that either of these meetings was coercive or in any way curtailed Brecht's freedom of action. *See State v. Koput*, 142 Wis.2d 370, 378, 418 N.W.2d 804, 808, citing *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (employing an objective test to assess whether a suspect is "in custody" for purposes of receipt of *Miranda* warnings). Schlesselman was an ordinary citizen, not a governmental officer. Thee was nothing coercive about Brecht's exchange with Schlesselman.

Similarly, officer Zeller's brief inquiry and offer of assistance to Brecht was not coercive nor restrictive of Brecht's freedom. We emphasize that the right to silence is derived from the privilege against *compelled* self-incrimination. Absent circumstances such as those present in *Fenel*, that might compel a reasonable person to speak and incriminate himself or herself, the privilege against compelled self-incrimination does not arise. Thus, the testimony elicited from Schlesselman and Zeller during the State's case-in-chief did not violate Brecht's rights under art. I, sec. 8 of the Wisconsin Constitution and the Fifth amendment of the United States Constitution.[3]

We further conclude that it was not constitutional error for the State to elicit officer Papke's testimony on Brecht's pre-*Miranda* silence during redirect. Brecht had "opened the door" to such inquiry into his silence when Brecht's counsel cross-examined Papke and raised, for the first time, Brecht's statements that it was a "big mistake"

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[3] Brecht also argues that this testimony should have been excluded as irrelevant. We disagree. Brecht's silence about the shooting during his encounters with Schlesselman and Zeller is relevant to the issue of his credibility and the State's theory that if Brecht had accidentally shot Hartman he would have sought help. In contrast to an individual's silence in the face of governmental coercion, where the right to silence is implicated, Brecht's silence under the circumstances presented here is not "insolubly ambiguous." *See Reichhoff*, 76 Wis.2d at 382, 251 N.W.2d 470, (noting that a defendant's custodial silence is "insolubly ambiguous" because such silence may be attributable to the fact that defendant is exercising his right to silence), citing *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

and that Brecht "wanted to talk to someone." Specifically, the following cross-examination occurred,

> "Q. After you had taken him into custody he made a statement to you as you approached the squad car didn't he?
>
> "A. Yes.
>
> "Q. In fact he told you that it was a big mistake, he wanted to talk to someone.
>
> "A. Yes he did.
>
> "Q. He never explained further to you what he meant by 'big mistake', did he?
>
> "A. No he didn't."

Because Brecht's counsel initially raised the issue of Brecht's silence when under arrest, the State was free to subsequently elicit Papke's testimony on Brecht's silence during arrest on redirect. *Accord United States v. Robinson*, ___ U.S. ___, 108 S.Ct. 864, 99 L.Ed.2d 23 (no violation of the fifth amendment for a prosecutor to refer to defendant's failure to testify where such remark is a "fair response to a claim made by the defendant or his counsel"); *United States v. Shaw*, 701 F.2d 367, 384 (5th Cir.1983).

Brecht next contends that his right to silence was further infringed by repeated references to his pre-*Miranda* silence during cross-examination and closing argument by the State. However, based on our recent decision in *State v. Sorenson*, 143 Wis.2d 226, ___, 421 N.W.2d 77, 99, we conclude that such references do not violate a defendant's right to silence under Art. I, Sec. 8 of the

Wisconsin Constitution once the defendant elects to testify. In *Sorenson*, we held that a testifying defendant may be impeached with his pre-*Miranda* silence.[4] *See also Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) (in which the United States Supreme Court declared that the fifth amendment is not violated when a testifying defendant is impeached with his pre-arrest silence). Thus, once Brecht chose to testify, the State was free to refer to his failure to tell authorities about the accidental nature of the shooting without infringing upon his constitutional right to silence.

Finally we address Brecht's claim that the State's references to his post-*Miranda* silence during cross-examination and closing argument violated his right to a fair trial under the due process clause of the federal and state constitutions. Because the record does not show that Brecht received his *Miranda* warnings until the time of his initial appearance, we only consider those comments which encompass his silence after his initial appearance and prior to trial. The first challenged reference to Brecht's post-*Miranda* silence occurred during the State's cross-examination of Brecht,

> "Q. In fact the first time you have ever told this story is when you testified here today was it not?
>
> ". . . .

[4] While the author of this opinion disagreed with the majority's curtailment of the right to silence in *Sorenson*, *see* 143 Wis. at ___, 421 N.W.2d at 93 (Bablitch J., concurring), and continues to adhere to that position, the resolution of this issue is controlled by the holding in *Sorenson*.

> "A. You mean the story of actually what happened?
>
> "Q. Yes.
>
> "A. I knew what happened, I'm just telling it the way it happened, yes, I didn't have a chance to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir."

The State inquired on re-cross examination,

> "Q. Did you tell anyone about what had happened in Alma?
>
> "A. No I did not."

Additionally, Brecht argues that the State's comments during closing argument were constitutional error,

> "and remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence. . . .
>
> ". . . .
>
> "He sits back here and sees all of our evidence go in and then comes out with this crazy story. . . .
>
> ". . . .
>
> "I know what I'd say, I'd say, I'd say 'hold on, this was a mistake, this was an accident, let me tell you what happened,' but he didn't say that did he. No, he waited until he hears our story."

It is well established that it is fundamentally unfair and a violation of a defendant's constitutional right to due process to use a defendant's silence after receipt of

Miranda warnings for impeachment purposes at trial. *Doyle*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (constitutional error to impeach a defendant with his post-arrest, post-*Miranda* silence); *Fencl*, 109 Wis.2d 224, 325 N.W.2d 703; *see also Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982) (per curiam) (where the Supreme Court limited its holding in *Doyle* by concluding that due process concerns do not prohibit impeachment with post-arrest, pre-*Miranda* silence), *accord Sorenson*, 143 Wis. at ___, 421 N.W.2d at 89. The basis for this holding is two-fold. First, because an arrestee's silence following *Miranda* warnings may be nothing more than his or her exercise of *Miranda* rights, post-*Miranda* silence is insolubly ambiguous. Second, and more important, it would be fundamentally unfair to allow an arrestee's silence to be used to impeach an explanation subsequently offered at trial after he or she has been impliedly assured, by *Miranda* warnings, that silence will carry no penalty. *Doyle*, 426 U.S. at 617-18, 96 S.Ct. at 2244-45.

Brecht's post-*Miranda* silence is, therefore, constitutionally protected at trial. The State's assertions that Brecht did not volunteer his explanation of the accidental nature of the shooting until the State presented its evidence at trial were comments on Brecht's post-*Miranda* silence and as such were constitutional error. We are unpersuaded by the State's attempts to characterize this improper use of Brecht's silence as merely a reference to "the defense tactic of not committing itself to a theory of defense prior to the presentation of the state's case."

Although it was constitutional error for the State to refer to Brecht's post-*Miranda* silence during cross-examination and closing argument, we conclude, contrary to

the court of appeals, that this error does not require reversal. A constitutional error is considered harmless if the court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). This requires that the court find that there is no "reasonable possibility" that the error "contributed to the conviction." *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985); *Chapman*, 386 U.S. at 23, 87 S.Ct. at 827. The relevant factors considered when determining harmless error include: 1) the frequency of the error, 2) the nature of the State's evidence against the defendant, and 3) the nature of the defense. *Rudolph*, 78 Wis.2d at 443, 254 N.W. 471.

In the present case, the improper references to Brecht's silence were infrequent. The four references comprised less than two pages of a 900 page transcript, or a few minutes in a four day trial in which twenty-five witnesses testified. Although the court of appeals emphasized the "length" of the State's comments on Brecht's silence, *Brecht*, 138 Wis.2d at 167, 405 N.W.2d 718, the court was including as error references to Brecht's silence during cross-examination. Because such references were found permissible in *Sorenson*, we limit our evaluation to references to Brecht's post-*Miranda* silence. Although we recognize that such references to a defendant's silence have a high potential for prejudice, *Reichhoff*, 76 Wis.2d at 382, 251 N.W.2d 470, we conclude that in the present case the infrequency of the references in the context of the entire trial mitigated any possible prejudicial effect on the jury. *Accord Fencl*, 109 Wis.2d at 238-39, 325 N.W.2d 703 (six references to defendant's silence during a five day trial were harmless beyond a reasonable doubt).

The other factors to consider are the strength of the evidence against Brecht and the nature of Brecht's defense. It is undisputed that Brecht shot Hartman. Brecht testified at trial that the shooting was an accident. However, the State introduced strong circumstantial evidence that the shooting was intentional, including evidence of motive. Hartman told several persons that Brecht had shot him in the back. Brecht never secured help for Hartman, although he had ample opportunity to do so. Instead, Brecht fled the scene and, ultimately, the state. Additionally, the physical evidence contradicts Brecht's assertion that the shooting was accidental. The horizontal trajectory of the bullet into Hartman's back is inconsistent with Brecht's testimony that the gun accidentally discharged as he was falling. Officers who surveyed the Hartman house after the shooting did not observe anything in the downstairs hallway which would have caused Brecht to trip. As we have noted in previous cases, a finding of guilt may be based upon circumstantial evidence alone. *Rudolph*, 78 Wis.2d at 444, 254 N.W.2d 471.

In conclusion, given the infrequency of the references in the context of the entire trial and the strength of the State's evidence against Brecht, the State's references to Brecht's silence were harmless beyond a reasonable doubt.

The second source of alleged error raised on appeal is whether the circuit court erred in permitting the State to make reference to and introduce evidence on Brecht's homosexuality. Prior to trial, Brecht had brought several motions to bar all references to his homosexuality on the

grounds that such evidence was both irrelevant and prejudicial. The State sought to introduce evidence of Hartman's disapproval of Brecht's homosexuality as a motive for the shooting. In particular, the State sought to question Molly Hartman about her husband's disapproval of Brecht's homosexuality and his communication of this disapproval to Brecht.

The trial court acknowledged the prejudicial nature of such evidence but concluded that it should be admitted because it was relevant on the issue of motive. During trial, the court also permitted the State to introduce letters Brecht wrote to an inmate in the Georgia prison where Brecht had been incarcerated. One letter indicated that Brecht planned to raise $50,000 and obtain his friend's release. Brecht objected to the admission of the letter because of its homosexual overtones and the possibility of prejudice.

The court of appeals held that the circuit court erred in admitting evidence of Brecht's homosexuality. The court of appeals reasoned that such evidence was irrelevant because of the lack of connection between Brecht's sexual preference and motive. However, we conclude that there was sufficient evidence linking Brecht's lifestyle to a motive for the shooting such that the evidence of Brecht's homosexuality was relevant.

A circuit court has broad discretion in determining the relevance and admissibility of proffered evidence. *State v. Pharr*, 115 Wis.2d 334, 342-45, 340 N.W.2d 498 (1983). When reviewing a question on the admissibility of evidence, an appellate court must determine whether the court exercised its discretion in accordance with accepted

legal standards and with the facts of record. *McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971). The test is not whether this court agrees with the ruling of the circuit court, but whether appropriate discretion was in fact exercised. *State v. Wollman*, 86 Wis.2d 459, 464, 273 N.W.2d 225 (1979).

Under sec. 904.02, Stats., relevant evidence is generally admissible. The criterion of relevancy is whether the evidence sought to be introduced has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01. This court has recognized that while motive is not an element of any crime it may nevertheless be a proper subject of inquiry and admissible if it meets the same standards of relevance as other evidence. *State v. Berby*, 81 Wis.2d 677, 686, 260 N.W.2d 798 (1978) ("Motive is an evidentiary circumstance which may be given as much weight as the fact finder deems it entitled to.").

In the present case, the circuit court found that the evidence referring to Brecht's homosexuality and Hartman's objections to Brecht's homosexuality did suggest a possible motive for the shooting and, therefore, made more probable the State's claim that Brecht had in fact murdered Hartman. The record reflects that Hartman disapproved of Brecht's homosexuality and that this disapproval was conveyed to Brecht by the restrictions Hartman and his wife imposed on Brecht while he lived in their home. These restrictions included that Brecht was to refrain from homosexual conduct and from inviting homosexual friends to the Hartman home. Thus, it is not unreasonable to infer that Brecht's homosexuality, which

prompted restrictions on his lifestyle, could furnish a motive for the shooting.

Moreover, Brecht's correspondence with a fellow inmate in the Georgia prison revealed that Brecht wanted to return to Georgia to obtain his friend's release. While the precise nature of Brecht's relationship with this individual is unclear from the record, Brecht's counsel acknowledged that one of the letters had strong homosexual overtones. It is not unreasonable to infer from this evidence that Brecht planned to return to Georgia, in violation of the conditions of his probation, to aid his friend. Additionally, it is not unreasonable to infer that Hartman, as the district attorney for Buffalo county, may have felt added responsibility in ensuring that his brother-in-law complied with his probation conditions. Thus, Brecht's desire to return to Georgia could also furnish the grounds for a dispute with Hartman and a motive for murder.

Based on the foregoing, we conclude that the circuit court did not abuse its discretion in holding that evidence of Brecht's homosexuality is probative of motive for the charged crime of first degree murder, and that the probative value of this evidence outweighs any possible prejudicial effect. We further note that the circuit court sought to minimize any prejudice to Brecht by instructing the jury on the limited purpose for which the evidence could be considered:

> "The evidence that the defendant is a homosexual . . . was also received solely so you could understand his presence in the Hartman home and the conditions imposed by them.

> "You must not conclude that because he . . . is a homosexual . . . that it is proof that he committed the offense with which he is now charged. That evidence was received only to give you the whole picture of the relationship between him and the Hartmans."

Thus, we reverse that portion of the court of appeals' decision which found an abuse of circuit court discretion in regard to the admissibility of evidence on Brecht's homosexuality.

Brecht also argues that the circuit court erred in ruling that the State could cross-examine Brecht's probation officer on Brecht's worthless check conviction if Brecht called the officer to testify about Brecht's non-violent character. While we agree that this ruling was error, we do not find that the error was prejudicial to Brecht.

Section 904.04(1)(a), Stats., permits an accused to introduce evidence of a pertinent character trait and the prosecution to also introduce evidence to "rebut the same." Section 904.04(1)(a). Evidence of a defendant's character for nonviolence has been recognized as a pertinent character trait in a prosecution for first degree murder. *See King v. State*, 75 Wis.2d 26, 38-39, 248 N.W.2d 458 (1977).

According to the record, Brecht's primary purpose in calling his probation agent as a witness was to have her testify about his non-assaultive, non-violent character. The circuit court ruled that once this testimony was proffered it would "open the door" to the State's cross-examination of the agent on Brecht's worthless check convictions. However, under sec. 904.04(1)(a), Stats., the

State's introduction of character evidence is limited to that which rebuts the character train being established, or in this case, Brecht's character for non-violence. Because Brecht's worthless check convictions are completely unrelated to the character trait of non-violence, the circuit court's ruling was in error.

Nonetheless, while the circuit court's ruling was improper it does not constitute reversible error. Brecht's defense was not undermined by the jury's failure to hear the probation agent's opinion on Brecht's character for non-violence. Additionally, as noted earlier, the State's evidence against Brecht was strong. Thus, in the absence of a reasonable possibility that this error contributed to the jury's decision to convict Brecht, we find that the circuit court's ruling was harmless error. *Dyess*, 124 Wis.2d 525, 370 N.W.2d 222.

Finally, Brecht argues that he was denied a fair trial by the content of the State's ex parte brief submitted to the circuit court. However, upon review of the State's ex parte brief and the record, we conclude that Brecht was not denied a fair trial.

The decision of the court of appeals is reversed.

CECI, J., did not participate.

United States District Court,
W.D. Wisconsin.

Todd A. BRECHT, Petitioner,

v.

Gordon A. ABRAHAMSON, Respondent.

No. 90-C-603-C.

March 14, 1991.

CRABB, Chief Judge.

This is a petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Petitioner, an inmate at the Dodge Correctional Institution in Waupun, Wisconsin, contends that he is in custody in violation of the Constitution of the United States. Petitioner seeks relief on three separate grounds: 1) that the state's use of his pretrial silence infringed on his Fifth and Fourteenth Amendment rights; 2) that certain rulings by the state court involving evidence of his homosexuality and rebuttal evidence of a prior worthless check conviction violated his due process rights; and 3) that the trial court's reliance on an ex parte trial brief violated his due process rights. Petitioner has exhausted his state remedies as required under 28 U.S.C. § 2254.

After reviewing the entire record, I conclude that references to petitioner's post-*Miranda* silence on cross-examination and in closing argument violated his due process rights and did not constitute harmless error. However, the state's references to petitioner's pre-*Miranda* silence did not infringe on his constitutional rights. Also, I conclude that the state court erred in admitting evidence about petitioner's homosexuality and in ruling

that testimony on a prior worthless check conviction would be admissible to rebut testimony on petitioner's non-violent character. Taken together, these evidentiary rulings are sufficiently prejudicial to violate petitioner's rights to a fundamentally fair trial. Finally, I conclude that petitioner's claim regarding the state's ex parte trial brief has no merit in light of petitioner's consent to the use of ex parte briefs and the absence of improper material in the brief.

In habeas corpus actions, state court findings of fact are presumed correct unless upon consideration of the record as a whole, the federal court concludes that factual determinations are not "fairly supported" by the record. 28 U.S.C. § 2254(d)(8); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1019 (7th Cir. 1987). Petitioner does not object to the accuracy or completeness of the state court findings. Therefore, I adopt the following facts paraphrased from the Wisconsin supreme court's decision in *State v. Brecht*, 143 Wis.2d 297, 421 N.W.2d 96 (1988), and the Wisconsin Court of Appeals' decision in *State v. Brecht*, 138 Wis.2d 158, 405 N.W.2d 718 (Ct.App.1987), supplemented by pertinent facts from the record.

Facts Found by State Courts

On October 17, 1985, petitioner shot and wounded his brother-in-law, Roger Hartman, who was the district attorney for Buffalo County, Wisconsin. Hartman died several weeks later. At his trial, petitioner testified that the shooting was accidental. However, the jury found him guilty of first degree murder.

Evidence at the trial disclosed the following: on October 12, 1985, Molly and Roger Hartman went to the Georgia State prison to secure the release of petitioner, who is Molly Hartman's younger brother. Petitioner's release from prison and placement on probation were conditioned on payment of $3,750 in restitution. The Hartmans paid his restitution and obtained his release and the transfer of his probation to Wisconsin.

The Hartmans brought petitioner to their home in Alma, Wisconsin, where he was to stay until an opening became available in an Eau Claire halfway house. The Hartmans told petitioner that while he lived in their home he was to refrain from drinking and from homosexual activity in the Alma area.

Petitioner testified that on the day of the shooting he had been drinking and playing with a gun that belonged to Roger Hartman while Hartman was at work and Molly Hartman was out shopping. Petitioner had been using the gun to shoot at tin cans in the Hartman's yard, when he saw Roger Hartman pull into the driveway. Because he did not want Hartman to see him with the gun, petitioner ran into the rear garage and entered a downstairs hallway. Petitioner explained that he intended to replace the gun in the upstairs room where he had found it.

Petitioner testified that he had stopped to listen for Hartman, heard nothing, and started running for the stairs to the upper level of the house when he tripped and the gun discharged. A bullet struck Hartman in the back.

Petitioner yelled to Hartman and looked for him but Hartman had disappeared. Petitioner then took Molly Hartman's car and drove around the area looking for

Hartman. When petitioner saw Hartman at the door of a neighbor's house, petitioner drove off in the car. The Hartman car was observed traveling at a faster than normal speed away from Alma and toward Fountain City.

Neighbors of the Hartmans testified that Roger Hartman came to their door seeking help and told them that petitioner had shot him. Police officers who had surveyed the Hartman residence after the shooting testified that they had found beer cans in the house, and a liquor bottle and a soda can with a bullet hole in it and a spent .22 casing in the backyard. Experts from the State Crime Laboratory testified that petitioner's fingerprints were on an ammunition box and on a brandy bottle found in the Hartman home. There was additional testimony that the doorway area leading into the hall from the garage was covered with tightly stretched carpet and that nothing was observed on which one could trip.

Meanwhile, petitioner had driven the Hartman car into a ditch near Fountain City, rendering the car inoperable. Officer Zeller arrived and offered petitioner assistance with the car, but petitioner told Zeller that his sister would call wrecker for him. Petitioner then caught a ride from a stranger, Melvin Schlesselman, to the nearest town, Winona, Minnesota. He did not mention the shooting incident to either Zeller or Schlesselman.

In Winona, petitioner was stopped by the police in a shopping center. When his identity was ascertained, he was arrested for the shooting of Hartman in Wisconsin. Petitioner told Officer Papke, one of the arresting officers, that it was a mistake and that he wanted to talk with

"somebody that would understand [him]." Neither petitioner's testimony nor that of the police officer indicates that petitioner explained the shooting incident upon arrest.

The record is unclear when petitioner received his *Miranda* warnings. The state submitted testimony by two of the five officers involved in the arrest, who testified that petitioner was not given his *Miranda* warnings in their presence. However, the record does reflect that petitioner received his *Miranda* warnings at his initial appearance.

On November 11, 1985, Roger Hartman died. A coroner testified that the bullet wound was a substantial factor in producing his death. He also testified that the bullet entered Hartman's back and exited his chest, traveling on a basically horizontal to slightly downward trajectory.

At trial, the state questioned Zeller, Schlesselman and Papke during its case-in-chief about petitioner's failure to mention Hartman's condition and the accidental nature of the shooting. Additionally, the state attempted to impeach petitioner's credibility directly by cross-examining him on his pre-trial silence concerning the shooting and by making reference in closing argument to his silence.

The first reference to petitioner's silence was elicited from officer Zeller, the officer who spoke to petitioner when his car was in the ditch.

> Q. Did you speak with this person [petitioner]?

> A. Yes.
>
> Q. What did you say?
>
> A. I asked him for his name, and I also asked him if he needed a wrecker, and where he was from.
>
> Q. What did he respond?
>
> A. He stated his name was Todd Brecht, and he stated that he was from Alma. In reference to the wrecker, he said, "My sister will get a wrecker from Alma."
>
> Q. Did he say anything else?
>
> A. No.

Schlesselman testified on direct examination by the state:

> Q. At any time during that period of time did he ever ask you to call and [sic] ambulance for anyone?
>
> A. No sir.
>
> Q. Did he ever ask you to call the police for him?
>
> A. No sir.
>
> Q. Did he ever mention a Roger Hartman to you?
>
> A. No sir.

On cross-examination of Papke, one of the officers who apprehended petitioner in Winona, petitioner's counsel elicited the following:

> Q. After you had taken him into custody he made a statement to you as you approached the squad car didn't he?

A. Yes.

Q. In fact he told you that it was a big mistake, he wanted to talk to someone.

A. Yes he did.

Q. He never explained further to you what he meant by "big mistake," did he?

A. No he didn't.

In response, the state conducted redirect examination of Papke.

Q. Officer Papke did you or anyone else in your presence advise the defendant of his constitutional rights?

A. No.

Q. Now you stated he said it was a big mistake – did he say what was a big mistake?

A. No he didn't.

Q. Did he offer any explanation about anything whatever?

A. No.

. . . .

Q. Was he advised as to why he was being taken into custody?

A. Yes he was.

Q. Again you stated what?

A. I told him he was sought by Buffalo County authorities for a shooting incident in Wisconsin.

Q. Did he explain anything about a shooting incident to you?

A. No he didn't.

Q. To anyone in your presence?

A. Not to my knowledge, no.

The state elicited testimony from Deputy Bratner during its case-in-chief.

Q. Did you arrest the defendant?

A. I served the arrest warrant on him, yes.

Q. Did you give him [sic] Miranda warning?

A. No.

On cross-examination, the state engaged petitioner in the following exchange:

Q. In fact the first time you have ever told this story is when you testified here today was it not?

. . . .

A. You mean the story of what actually happened?

Q. Yes.

A. I knew what happened, I'm just telling it the way it happened, yes, I didn't have a chance to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir.

On re-cross examination, the state inquired:

Q. Did you tell anyone about what had happened in Alma?

A. No I did not.

During closing argument, the state made the following comments:

> . . . and remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence. . . .
>
> . . . .
>
> . . . he made no statements to the law enforcement officers. . . .
>
> . . . .
>
> He sits back here and sees all of our evidence go in and then comes out with this crazy story. . . .
>
> . . . .
>
> I know what I'd say, I'd say, I'd say "hold on, this was a mistake, this was an accident, let me tell you what happened," but he didn't say that did he. No, he waited until he hears our story.

The state also sought to introduce evidence of petitioner's homosexuality to establish a possible motive for the shooting. The trial court permitted such evidence, over petitioner's objection, noting its relevancy to the issue of motive. During trial, the state produced letters petitioner had written to an inmate in the Georgia prison where petitioner had been incarcerated. Additionally, the state elicited testimony from Molly Hartman that her husband had disapproved of petitioner's homosexuality. However, she gave conflicting testimony as to whether her husband had communicated this disapproval directly to petitioner. The trial court gave the following instruction to the jury:

> The evidence that the defendant is a homosexual . . . was also received solely so you could understand his presence in the Hartman home and the conditions imposed by them.
>
> You must not conclude that because he . . . is a homosexual . . . that it is proof that he committed the offense with which he is now charged. That evidence was received only to give you the whole picture of the relationship between him and the Hartmans.

Petitioner sought to call his probation officer to testify about petitioner's non-violent character. The trial court ruled that the introduction of such evidence would also permit the state to cross-examine the officer about petitioner's conviction for writing worthless checks. Consequently, petitioner chose not to call his probation officer and rested his case.

Both parties stipulated to the filing of ex parte briefs to the court. These briefs were subsequently filed in open court.

After the jury verdict, petitioner was sentenced to life in prison with a penalty enhancement for use of a dangerous weapon and for being a repeat offender. On appeal, the Wisconsin Court of Appeals reversed the conviction on the grounds that the state's references to petitioner's silence impermissibly infringed upon petitioner's right to silence and to a fair trial, and that such references were prejudicial. The court further concluded that the trial court erred in admitting evidence of petitioner's homosexuality and in ruling that the state could cross-examine the probation officer on petitioner's worthless checks conviction.

Additional Facts From The Record

At the pretrial hearing on petitioner's motion in limine to exclude certain evidence, including evidence of his sexual preference, the state represented to the trial court that "Mrs. Hartman didn't have a lot of problem with [petitioner's homosexuality] but Mr. Hartman did and made this known to the defendant. All of this Mrs. Hartman will testify about." The trial court ruled that, despite its prejudicial nature, the evidence had some bearing on the relationship between Hartman and petitioner and a possible motive. At trial, Molly Hartman testified as follows:

> Q. Did [petitioner] tell you that he was a homosexual?
>
> A. Yes.
>
> Q. That week after returning home did you and Roger discuss the homosexuality with Todd?
>
> A. Yes.
>
> Q. On about how many occasions?
>
> A. 3-4 perhaps.
>
> Q. What was Roger's attitude concerning Todd's homosexuality?
>
> . . . .
>
> A. Roger had a hard time accepting it, he could not udnerstand [sic] it.

On cross-examination by petitioner's counsel, Molly Hartman testified further.

> Q. . . . Now you indicated . . . that Roger couldn't understand [petitioner's] homosexuality. Could you explain what you meant by that?
>
> A. Well I guess it's just that way. I guess as far as Roger was concerned he couldn't understand homosexuality, he couldn't understand why that would be a male preference.
>
> Q. Did he express the fact that he could not understand it to Todd?
>
> A. I don't know.
>
> Q. Did he ever do that in your presence?
>
> A. No.
>
> Q. Now you also indicated that Roger had a hard time accepting Todd's homosexuality or bisexuality. Is that the same as not being able to understand it, or is that something different that you were trying to explain?
>
> A. I guess that is a little different.
>
> Q. Could you explain what your understanding was of what was said in terms of how he had a hard time accepting it?
>
> A. I guess it's just the conservative attitude that – he didn't want a brother-in-law who was a homosexual.
>
> Q. Did he openly express this to Todd?
>
> A. No.
>
> Q. Did he ever do so in your presence?
>
> A. No.
>
> Q. So if I understand it then, his attitude of having a hard time in accepting and not being

able to understand it were things that had been Roger's reaction to the things that were communicated to you in private?

A. Yes.

. . . .

Q. Were there ever any cross words between Roger and Todd that you were aware of?

A. I'm not aware of any arguments.

Q. And at the time Todd was there you thought basically that their relationship, yours and Todds [sic], and Todd's and Roger's relationship was a good relationship?

A. Yes.

Molly Hartman also corroborated petitioner's testimony that he had problems walking and jogging because of a previous foot injury.

One of the neighbors who assisted Hartman just after the shooting testified that she asked Hartman whether he thought petitioner had anything against him. Hartman replied, "I don't know."

After accepting the state's petition for review, the Supreme Court of Wisconsin reversed the decision by the Wisconsin Court of Appeals. The supreme court held that the references to petitioner's pre-*Miranda* silence were not constitutional violations. Although it found that the references to petitioner's post-*Miranda* silence did violate petitioner's due process rights, the supreme court found the references to constitute harmless error. In addition, the supreme court concluded that the trial court did not abuse its discretion in admitting evidence of petitioner's

homosexuality, and that it committed harmless error in ruling that the worthless check convictions were admissible rebuttal evidence to the probation officer's proposed testimony on petitioner's non-violent character. Finally, the supreme court concluded that petitioner was not denied a fair trial by the content of the state's ex parte trial brief.

OPINION

Use of Pre-trial Silence

Petitioner contends that all use by the state of his pretrial silence violates his rights under the Fifth and Fourteenth Amendments.[1] The Fifth Amendment right against self-incrimination guarantees a criminal defendant the right to remain silent after he is arrested and precludes the prosecution from commenting on the silence of a defendant who asserts the right. *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106 (1965). To safeguard Fifth Amendment rights, the Supreme Court requires that a person taken into custody be advised immediately "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has a right to the presence of an attorney, and that if he cannot afford an attorney,

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[1] Petitioner has filed no brief responding to the Wisconsin supreme court decision. The initial brief in support of the petition for a writ of habeas corpus consists primarily of a photocopied copy of the brief filed with the supreme court. Petitioner filed no reply brief to respondent's brief in opposition to the petition.

one will be appointed for him prior to any questioning." *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966).

In a later case, *Doyle v. Ohio*, 426 U.S. 610, 617 96 S.Ct. 2240, 2244, 49 L.Ed.2d 91 (1976), the Court recognized that an arrestee's silence after receipt of *Miranda* warnings may be nothing more than an exercise of the rights explained in the warnings and is thus, "insolubly ambiguous." The Court found it fundamentally unfair for the state to offer implicit assurances in the *Miranda* warnings and then use subsequent silence to impeach an accused's explanation at trial. The Court concluded that "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* 426 U.S. at 619, 96 S.Ct. at 2245.

The Supreme Court refused to extend its holding in *Doyle* to use of an accused's pre-arrest, pre-*Miranda* silence. *Jenkins v. Anderson*, 447 U.S. 231, 238-240, 100 S.Ct. 2124, 2129-30, 65 L.Ed.2d 86 (1980) (impeachment by pre-arrest, pre-*Miranda* silence does not violate the Fifth or the Fourteenth Amendment). And, in *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the Court allowed the government in a murder case to use the defendant's post-arrest silence to impeach his claim that he acted in self-defense, when he had not received any *Miranda* warnings during the period in which he remained silent immediately after his arrest. *Jenkins*, *Fletcher*, and later holdings confirm that *Doyle* rests on the fundamental unfairness inherent in assuring a defendant that he may remain silent and then impeaching him with his silence at trial. *Greer v. Miller*, 483 U.S. 756, 763, 107 S.Ct. 3102, 3107, 97 L.Ed.2d 618 (1987). "Thus, 'absen[t] the sort of affirmative assurances embodied in the *Miranda* warnings,' the Constitution does not prohibit the use of a defendant's postarrest silence to impeach him at trial." *Id.* (quoting *Fletcher*, 455 U.S. at 607, 102 S.Ct. at 1312).

Neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has addressed the precise question whether the state's reference to pre-*Miranda* silence in its case-in-chief violates the Fifth Amendment. *Fencli v. Abrahamson*, 841 F.2d 760, 766 (7th Cir.1988). It is clear, however, that only a person subjected to custodial interrogation is entitled to the Fifth Amendment protections embodied in the *Miranda* warnings. *See Berkemer v. McCarty*, 468 U.S. 420, 434, 104 S.Ct. 3138, 3147, 82 L.Ed.2d 317 (1984). A person questioned during a routine traffic stop, for instance, is not "in custody" and *Miranda* warnings are not required. *Id.* 468 U.S. at 442, 104 S.Ct. at 3151.

I turn now to the challenged references to petitioner's silence in this case. I agree with the Wisconsin supreme court that it was constitutionally permissible for the state to refer to petitioner's pre-*Miranda* silence when cross-examining him. *Jenkins*, 447 U.S. at 238-240, 100 S.Ct. at 2129-2130; *Fletcher*, 455 U.S. at 607, 102 S.Ct. at 1312. I agree also that the state's references to petitioner's pre-*Miranda* silence during its case-in-chief did not violate the Fifth or Fourteenth Amendment. Petitioner's encounters with Schlesselman and Zeller were not the type of coercive or custodial situations that invoke the need for Fifth Amendment protection. *See Berkemer*, 468 U.S. at 434, 104 S.Ct. at 3147. Schlesselman is not a police

officer and gave petitioner a ride to a nearby town at petitioner's request. Although Zeller is an officer, his conversation with petitioner was even less coercive than an ordinary traffic stop and did not implicate petitioner's right to silence. The testimony elicited from Deputy Bratner, the arresting officer, made no reference to petitioner's silence.

The questioning of Officer Papke requires a different analysis. The state asked Papke specifically about petitioner's failure to explain the shooting incident after his arrest while he was in custody. However, this inquiry was in response to questions posed by petitioner's counsel. On cross-examination of Papke, petitioner's counsel asked whether petitioner had stated that "it was a big mistake" and "he wanted to talk to someone." Petitioner's counsel also asked whether petitioner had ever explained to Papke what he meant by "big mistake." These questions opened the door to the state's further inquiry about the extent of petitioner's remarks to Papke. *See United States v. Robinson*, 485 U.S. 25, 34, 108 S.Ct. 864, 870, 99 L.Ed.2d 23 (1988) (no Fifth Amendment violation to refer to defendant's silence in fair response to remarks made by defense counsel). The questioning of Papke on redirect examination did not violate petitioner's constitutional rights.

However, the situation is different with respect to the state's references to petitioner's post-*Miranda* silence during its cross-examination of petitioner and in closing argument. These references constitute due process violations under *Doyle*. The clear implication of the state's repeated remarks was that petitioner's failure to explain

the accidental nature of the shooting prior to trial evidenced his guilt. The Wisconsin supreme court recognized that the references were a violation of the Constitution, but found them to be harmless. I cannot agree.

Whether a constitutional error is harmless is a question of federal law. It is not subject to the presumption of correctness given to the state court's findings of fact. *Savory*, 832 F.2d at 1018; *see United States v. Flannigan*, 884 F.2d 945, 950-51 (7th Cir.1989) (federal court not bound by state court's ruling that constitutional error is harmless.) "Constitutional error is reversible error unless it is harmless beyond a reasonable doubt." *United States v. Shue*, 766 F.2d 1122, 1132 (7th Cir.1985) (citing *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) and *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). A district court must determine whether a reasonable possibility exists that the errors complained of might have contributed to the defendant's conviction. *Savory*, 832 F.2d at 1019. The question becomes "whether absent the constitutionally-forbidden evidence, honest and fair-minded jurors might very well have brought in not-guilty verdicts." *Burns v. Clusen*, 798 F.2d 931, 943 (7th Cir.1986) (citing *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828).

Respondent had the burden of proving a constitutional error harmless. *Fencl*, 841 F.2d at 768. In most cases, the Court of Appeals for the Seventh Circuit requires that the other evidence of guilt be "overwhelming" before concluding that a constitutional error was harmless. *Savory*, 832 F.2d at 1020; *Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir.1988) (error not harmless where evidence of guilt was impressive, but not overwhelming).

In this case, there were at least four occasions during cross-examination and closing argument on which the state made reference to petitioner's failure to explain the accidental nature of the shooting at any time before trial. The Supreme Court of Wisconsin concluded that "the infrequency of the references in the context of the entire trial mitigated any possible prejudicial effect on the jury." *Brecht*, 143 Wis.2d at 318, 421 N.W.2d at 104.

It is true that the references are not extensive and the trial transcript is lengthy, but the state's references to petitioner's post-*Miranda* silence are crucial. Petitioner admitted shooting Hartman. The sole issue for the jury was whether the shooting was accidental or intentional. With the defense hinging on petitioner's credibility, the state's remarks that he simply concocted a "crazy story" at the time of trial may have been determinative.

Moreover, the state's circumstantial evidence that petitioner intended to shoot Hartman falls short of overwhelming. Although Hartman told several people that petitioner had shot him in the back, he also indicated that he knew of no reason why petitioner would shoot him intentionally. Petitioner did not call for help for Hartman and fled in Hartman's car, but this evidence is as consistent with a panic-stricken reaction to a horrible accident as it is with an intentional homicide. Police officers found nothing at the scene that could have tripped petitioner, but both petitioner and Molly Hartman testified to petitioner's foot injury known to trip for no apparent reason. In addition, there is virtually no evidence of motive. In his brief, respondent suggests that "the most probable motive for the murder was the petitioner's desire to raise money for his homosexual friend Darrell Mason and to

obtain his freedom so he could return to Georgia to be with him." It is questionable whether the record supports the proposition that petitioner wanted to leave Wisconsin. Even if it did, this says nothing about petitioner's motive for murdering his brother-in-law. Finally, respondent points to the evidence that the bullet entered Hartman at a horizontal trajectory. This evidence may be inconsistent with petitioner's claim that the shooting was an accident, but it is not conclusive. A rational jury could have believed petitioner's story and reconciled the supposed inconsistencies. *Shue*, 766 F.2d at 1133.

Because the state's effort to present petitioner's story as a recent fabrication by referring to his post-*Miranda* silence may have influenced the verdict, I conclude that respondent has not met his burden of proving that the use of petitioner's post-*Miranda* silence constitutes harmless error. Accordingly, I will grant the petition for a writ of habeas corpus. For the sake of completeness, I will address petitioner's other claims.

Evidentiary Rulings

Petitioner contends that the trial court's evidentiary rulings involving his homosexuality and the testimony of his probation officer violated his due process rights. The admissibility of evidence in a state criminal trial is generally a matter of state law. *Flannigan*, 884 F.2d at 953. A district court can issue a writ of habeas corpus only when an erroneous state evidentiary ruling "is of such magnitude that the result is a denial of fundamental fairness" and consequently, a denial of due process. *Dudley*, 854 F.2d at 970. In deciding whether a writ should issue, a

court must determine whether the probative value of the evidence is greatly outweighed by its prejudicial effect on the accused. *Flannigan*, 884 F.2d at 953.

Respondent contends that the evidence of petitioner's homosexuality was relevant to the issue of motive. In response to petitioner's motion in limine on this issue, the state represented to the trial court that it would provide evidence that Hartman disapproved of petitioner's sexual preference and made that known to him. At trial the state's evidence was that Hartman discussed petitioner's homosexuality with him on several occasions, did not understand or, accept petitioner's homosexuality and restricted him from engaging in homosexual relationships while staying with the Hartmans. Discussing a person's sexual preference and setting restrictions on that person's behavior while staying in one's home are not equivalent to communicating disapproval or condemnation to that person. The state's evidence might be relevant to a possible motive if there was any evidence to indicate that petitioner and Hartman had argued about the restrictions or about petitioner's sexuality. There was none. Molly Hartman testified specifically that her husband never indicated his feelings about petitioner's sexuality in her presence and that she was not aware of any disagreements between petitioner and Hartman.

Respondent argues also that evidence of petitioner's homosexuality was relevant to his motivation for returning to Georgia to help his friend, Darrell Mason. Although respondent asserts that petitioner's counsel admitted that at least one letter petitioner composed to Mason had "homosexual overtones," there is no proof in

the record that petitioner's relationship with Mason was sexual. Even assuming such a relationship, it is difficult to connect petitioner's alleged desire to return to Georgia with a motive for murdering Hartman.

I conclude that the evidence of petitioner's homosexuality was not relevant to any purported motive petitioner had to shoot his brother-in-law. Other courts have recognized that "evidence of homosexuality is extremely prejudicial" in a criminal trial and that even a limiting instruction to the jury is "not sufficient to obviate the prejudice." *United States v. Gillespie*, 852 F.2d 475, 479 (9th Cir.1988).

The question remains whether the erroneous admission of evidence about petitioner's homosexuality was of the magnitude to deny petitioner a fundamentally fair trial. Standing alone, the prejudicial effect might not constitute a denial of due process. However, the trial court also erred in ruling that evidence of worthless check violations would be admissible if petitioner called his probation officer to testify to his non-violent character. As the Wisconsin supreme court noted, Wis.Stat. § 904.04(1)(a) limits the state's introduction of character evidence to that which rebuts the character trait of non-violence. *Brecht*, 143 Wis.2d at 322, 421 N.W.2d at 106. The court held that because petitioner's "worthless check convictions are completely unrelated to the character trait of non-violence, the circuit court's ruling was in error." *Id.* at 323, 421 N.W.2d at 106.

Other than petitioner's own testimony and brief testimony by an officer who observed petitioner after he was

arrested and in jail custody, the probation officer's testimony was to be the only testimony offered for the defense. Evidence that petitioner was non-violent is directly relevant to the central issue whether the shooting was accidental or intentional. The combined errors of allowing prejudicial evidence of petitioner's homosexuality and effectively excluding testimony on his non-violent character are significant in a case lacking overwhelming evidence of guilt. Accordingly, I conclude that petitioner would be entitled to a writ of habeas corpus based on his claim that evidentiary rulings denied him due process.

Ex Parte Trial Brief

Finally, petitioner contends that the trial court's acceptance of the state's ex parte brief constitutes a denial of due process. Petitioner argues that through its brief, the state improperly tried to persuade the court of petitioner's guilt before trial. However, petitioner stipulated to the submission of ex parte briefs and filed his own with the court. I agree with the Wisconsin supreme court that nothing challenged in the state's ex parte brief denied petitioner a fundamentally fair trial. *Brecht*, 143 Wis.2d at 323, 421 N.W.2d at 106. Accordingly, I conclude that petitioner is not entitled to a writ of habeas corpus on the ground that the state's ex parte trial brief violated his right to due process.

ORDER

IT IS ORDERED that petitioner's petition for a writ of habeas corpus is GRANTED on the grounds that petitioner's right of due process was violated by the state's improper references to petitioner's post-*Miranda* silence and the trial court's erroneous evidentiary rulings. On all other grounds, the petition is DENIED.

Execution of the writ of habeas corpus will be stayed for sixty (60) days from the date of this order to permit the state to provide petitioner a new trial. If petitioner is not provided a new trial within that time, the writ will issue.

United States Court of Appeals,
Seventh Circuit.

Todd A. BRECHT, Petitioner-Appellee,

v.

Gordon A. ABRAHAMSON,
Superintendent, Dodge Correctional Institution,
Respondent-Appellant.

No. 91-1835.

Argued July 10, 1991.

Decided Sept. 26, 1991.

Rehearing and Rehearing En Banc
Denied Nov. 20, 1991.

Before CUDAHY and EASTERBROOK, Circuit Judges, and PELL, Senior Circuit Judge.

EASTERBROOK, Circuit Judge.

Todd A. Brecht was serving time in Georgia for felony theft when his sister Molly Hartman paid the restitution for Brecht's crime and took temporary custody of him while he awaited an opening in a halfway house. This created a sticky situation because Molly's husband Roger was the district attorney for Buffalo County, Wisconsin. There cannot be many public prosecutors who want to have a felon about the house. The awkwardness of putting up the black sheep of the family was augmented by the fact that Brecht, a heavy drinker is also homosexual, which Roger disapproved. The Hartmans explained to Brecht, when they picked him up at the prison gate on October 10, 1985, that there was to be no

drinking or homosexual activity so long as he remained at their home. They reiterated that theme at least twice more before October 17, when Brecht shot and killed Roger Hartman. Wisconsin convicted Brecht of murder and sentenced him to life imprisonment. A district court has ordered him released. 759 F.Supp. 500 (W.D.Wis.1991). Whether the writ of habeas corpus should issue depends on the standard of harmless error employed on collateral review.

I

While Roger Hartman was at work on October 17 and Molly Hartman was shopping, Brecht raided the Hartmans' liquor cabinet for beer and brandy, and their gun cabinet for a rifle. Out in the back yard, Brecht opened fire on some cans. When Roger returned, Brecht shot him in the back and fled in Molly's car. Roger crawled up the hill to a neighbor's house to summon help (the phone on the ground floor of the Hartman home was inoperable, Brecht having taken a receiver off the hook upstairs). Help came, but the injury was too serious; Roger died on November 11. Roger named his assassin to the neighbor and an officer who arrived with the medics. Brecht's initial flight ended after he drove the car into a ditch. When a police officer stopped to inquire, Brecht asserted that Molly Hartman knew about the wreck and had called a tow truck. That lie was coupled with silence about the shooting. Brecht hitched a ride to Winona, Minnesota, where the police nabbed him in a shopping center. Brecht first lied about his identity and when that did not work asked to talk with "somebody that would understand me." He said nothing else.

Come the trial, Brecht admitted shooting Roger Hartman but contended that the rifle discharged by accident. According to Brecht, Roger's return caught him by surprise; he did not want Roger to see him with a gun and raced to take the rifle upstairs before Roger entered the house. He tripped as he was heading toward the stairs, Brecht testified, and the gun went off as he fell. He tried to find Roger to offer aid, Brecht maintained, but Roger had left the house. Only after seeing Roger at the neighbor's door did Brecht drive away in panic, according to his tale.

It is unlikely, but not impossible, that someone would run with his finger on the trigger of a cocked bolt-action rifle. The state thought the path of the bullet dispositive. The coroner testified that the bullet entered Roger Hartman's upper body on a horizontal to slightly downward trajectory, inconsistent with a claim that the weapon was discharged as its bearer was falling. The rifle was found on the patio near the pool (where Roger was shot), not inside near the stairs; a live round was jammed in the chamber (from which a jury could have inferred that Brecht tried to fire another shot). In further response to the defense of the accident, the prosecutor pointed to (a) Brecht's failure to summon aid for Roger; (b) his flight; (c) his lies to the police; (d) his failure to say to anyone, at any time before trial, that the shooting was accidental; and (e) his homosexuality. The first four were offered to impeach Brecht's testimony, and the fifth to establish a motive – hostility to Roger, reciprocating Roger's hostility to Brecht's sexual preference and the ban on its practice in the Hartmans' home. The prosecutor also obtained a

ruling from the trial court that if Brecht called his probation officer in Wisconsin to testify that Brecht lacks a violent disposition, the state could offer into evidence Brecht's conviction for passing worthless checks. Brecht elected not to call the probation officer.

The Court of Appeals of Wisconsin reversed Brecht's conviction. *State v. Brecht*, 138 Wis.2d 158, 405 N.W.2d 718 (1987). It gave three reasons: first, that the prosecutor's use of Brecht's silence violated both the self-incrimination clauses of the state and federal Constitutions and the due process clause of the federal Constitution; second, that the references to Brecht's homosexuality were unduly prejudicial because the prosecutor was not able to show that Roger Hartman communicated antipathy explicitly to Brecht; third, that the court's ruling on the motion *in limine* was wrong because worthless checks do not establish a propensity for violence. The court concluded that these errors were not harmless.

The Supreme Court of Wisconsin reversed in turn, unanimously reinstating the conviction. 143 Wis.2d 297, 421 N.W.2d 96 (1988). Relying on *State v. Sorenson*, 143 Wis.2d 226, 421 N.W.2d 77 (1988), the court rebuffed all claims under the self-incrimination clause of the state constitution, just as *Jenkins v. Anderson*, 447 U.S. 231, 235-39, 100 S.Ct. 2124, 2127-30, 65 L.Ed.2d 86 (1980), had held that use of silence to impeach a testifying defendant does not violate the self-incrimination clause of the federal Bill of Rights. Turning to the due process inquiry, the court observed that prosecutors may use as impeachment silence preceding the delivery of the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). See *Fletcher v. Weir*, 455 U.S. 603, 102

S.Ct. 1309, 71 L.Ed.2d 490 (1982). Nothing in the record implies that Brecht was told, until his arraignment, that he had a right to remain silent. It follows from *Jenkins* and *Fletcher*, the court held, that the prosecutor could impeach Brecht's testimony at trial by observing that he did not tell anyone before his arraignment the story he told on the stand at trial. Silence at and after the arraignment was another matter under *Doyle v. Ohio*, 426 U.S 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the court thought, because advice that you have a right to be silent implies that silence may not be used against you. Twice the prosecutor asked Brecht whether he told anyone at *any* time before trial that the shooting was accidental; twice the prosecutor remarked in closing argument that Brecht told no one; these four references, the court thought, invited the jury to draw an adverse inference from post-arraignment silence and thus violated the rule established in *Doyle*.

This did not avail Brecht, however, because the court deemed four references in a four-day trial to be peripheral; the error, the court held, was harmless beyond a reasonable doubt. Error in the ruling on the motion *in limine* the court put into the same category. As for the evidence of Brecht's homosexuality: the court held this no error at all. Although Molly Hartman testified that her husband had not "openly express[ed]" his disapproval of homosexuality to Brecht, and that there had been no set-to, she also testified that her husband "didn't want a brother-in-law who was a homosexual." (The district court's opinion reproduces this part of her testimony, 759 F.Supp. at 505.) The Supreme Court of Wisconsin concluded that Roger Hartman's "disapproal was conveyed to Brecht by the restrictions Hartman and his wife

imposed on Brecht while he lived in their home. These restrictions included that Brecht was to refrain from homosexual conduct and from inviting homosexual friends to the Hartman home. Thus, it is not unreasonable to infer that Brecht's homosexuality, which prompted restrictions on his lifestyle, could furnish a motive for the shooting." 143 Wis.2d at 321, 421 N.W.2d at 105.

The district court continued this game of Ping-Pong by issuing a writ of habeas corpus. Chief Judge Crabb agreed with the Court of Appeals of Wisconsin on all issues: she concluded that the comments on Brecht's silence violated the due process clause, that the evidentiary rulings were erroneous, and that none of the errors is harmless beyond a reasonable doubt. We summarize only her grounds of disagreement with the Supreme Court of Wisconsin.

Concerning evidence of homosexuality, the district judge wrote: "Discussing a person's sexual preference and setting restrictions on that person's behavior while staying in one's home are not equivalent to communicating disapproval or condemnation to that person." 759 F.Supp. at 509. The references to Brecht's homosexuality therefore were irrelevant, and, given the subject matter, prejudicial.

Disagreement on whether the references to post-arraignment silence were harmless was driven largely by the different questions the courts asked. The Supreme Court of Wisconsin asked whether these four references added substantial force to the many proper references to pre-arraignment silence and the lies Brecht told to the police; it concluded that the incremental effect was small.

The district court, by contrast, asked whether the evidence against Brecht was irrefutable, stating that "the Court of Appeals for the Seventh Circuit requires that the other evidence of guild be 'overwhelming' before concluding that a constitutional error was harmless." 759 F.Supp. at 508. It then concluded that the evidence against Brecht is less than overwhelming: there was no apparent motive, and the flight may have been inspired by panic rather than a desire to escape. The court wrote that the evidence about the trajectory of the bullet "may be inconsistent with [Brecht's] claim that the shooting was an accident, but it is not conclusive." 759 F.Supp. at 508.

The district court ordered Brecht released unless retried within 60 days. We stayed this order and now become the fourth court in sequence to disagree with its immediate predecessor.

II

This case is here under 28 U.S.C. § 2254(a), which says that a court shall entertain a petition for habeas corpus "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." "A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 875, 79 L.Ed.2d 29 (1984). See also, e.g., *Lewis v. Jeffers*, ___ U.S. ___, 110 S.Ct. 3092, 3102, 111 L.Ed.2d 606 (1990); *Smith v. Phillips*, 455 U.S. 209, 221, 102 S.Ct. 940, 948, 71 L.Ed.2d 78 (1982); *Rose v. Hodges*, 423 U.S. 19, 22, 96 S.Ct. 175, 177, 46 L.Ed.2d 162 (1975); *Bates v. McCaughtry*, 934 F.2d 99 (7th Cir.1991); *Bell*

v. Duckworth, 861 F.2d 169 (7th Cir.1988); *Jones v. Thieret*, 846 F.2d 457 (7th Cir.1988). Whether the probative force of Brecht's homosexuality exceeded its potential for improper use, and whether the prosecutor may put a defendant's prior convictions before the jury, are staples in the law of evidence. Errors in admitting or excluding evidence do not violate the Constitution unless the trial as a whole is so infected that the verdict is no longer reliable. *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *Lisenba v. California*, 314 U.S. 219, 228, 62 S.Ct. 280, 286, 86 L.Ed. 166 (1941). But see *McGuire v. Estelle*, 902 F.2d 749 (9th Cir.1990), rehearing denied, 919 F.2d 578 (1990), cert. granted, ___ U.S. ___, 111 S.Ct. 1071, 112 L.Ed.2d 1177 (1991). The district court did not ask whether Wisconsin conducted a trial that was, all things considered, adequate to sift guilt from innocence; it asked instead whether there were errors, and whether these were harmless beyond a reasonable doubt. Given *Donnelly v. De Christoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), and *Darden v. Wainwright*, 477 U.S. 168, 106 S.C. 2464, 91 L.Ed.2d 144 (1986), not to mention *Cupp* and *Lisenba*, that is the wrong approach.

Even taking the subjects in isolation, as the district judge did, does not call into question the validity of the state's judgment. Whether the Hartmans' interdict on homosexual acts and homosexual friends at their home conveyed to Brecht Roger Hartman's reprehension of his sexual preference, and thus perhaps engendered Brecht's hostility, is an nice question of inference. A state may choose to give this question to a jury. The district judge substituted her assessment for that of the Supreme Court

of Wisconsin: she did not say that its opinion is unreasoned or beyond the bounds of dispute; she simply disagreed. That is not an appropriate stance for a federal judge engaged in collateral review of a state conviction. "[R]espect for a state court's findings of fact and application of its own law counsels against the sort of *de novo* review undertaken" by the district court. *Lewis*, 110 S.Ct. at 3102.

United States v. Gillespie, 852 F.2d 475, 478-79 (9th Cir.1988), which the district court cited for the proposition that evidence of homosexuality is prejudicial, is another kettle of fish. In a federal prosecution for sexually molesting a three-year-old girl, the prosecution introduced evidence that the defendant had a homosexual relationship with his adoptive father, inviting the inference that anyone departing from the sexual norm is likely to violate little girls. There is no reason to think that homosexuals are likely to be pedophiles; the court properly thought the introduction of this evidence an abuse of discretion under Fed.R.Evid. 404(b). *Gillespie* was not a constitutional decision, and the use made of homosexuality in that case bears no resemblance to its use in this one.

Now for the trial court's ruling that if the probation officer testified, the prosecution could use Bracht's bad-check convictions in cross-examination. The Supreme Court of Wisconsin has determined authoritatively that the court erred under state law. It does not follow that Wisconsin has violated the Constitution of the United States. The district court did not adduce any authority for its conclusion. Brecht's brief in this court likewise offers

no authority, although he does try to distinguish *Michaelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948), the state's principal case.

Had the identical subject arisen in federal court, there would have been no reversible error, period. *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984), holds that a defendant who wishes to contest a ruling allowing the use of a conviction in cross-examination must present the testimony and endure the cross-examination. Otherwise, the Court concluded, it is impossible to put in context the use made of the conviction and to evaluate a claim of prejudice. Just so here. We have no idea – since the probation officer did not testify, and the convictions were never laid before the jury – how they would have been used, and with what effect, if any, on the trial. We also do not know how vulnerable was the testimony foregone.

It is, at all events, difficult to accept the idea that the Constitution forbids a state to inform the jury of a defendant's prior convictions. Brecht testified, and a federal jury normally learns of a testifying defendant's crimes. Fed.R.Evid. 609(a). Wisconsin does things differently, which may account for the prosecutor's effort to introduce the convictions when examining the probation officer, but this difference hardly makes anathema of the knowledge. Especially not when the witness was going to be the defendant's *probation officer*; it does seem apt to ask such a person what crime the defendant was on probation for. The jury knew from the circumstances of Brecht's presence in the Hartman home that Brecht was a convicted felon; learning that the felony was writing bad checks (as opposed to, say, mayhem or selling drugs) is

an unlikely prospect for constitutional error in a murder case. We turn, then, to the prosecutor's comment on Brecht's failure to say at any time before trial that the shooting was a mishap.

III

"Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative." *Jenkins*, 447 U.S. at 239, 100 S.Ct. at 2129 (citations omitted). If Brecht indeed shot Roger Hartman by accident, he had every reason to tell the police early and often. How else was he to win release from prison – or to ensure that investigators preserved evidence that would support his version of events? Why would an innocent man keep his sister in the dark about the circumstances of her husband's death? Would he not at least apologize for the accident? Silence supports an inference that it took Brecht a while to cook up a story. Fabricated defenses are best withheld until after the state has rested, not only to catch the opposition off guard but also to avoid any blatant inconsistencies with the facts the prosecution adduces.

But for *Doyle v. Ohio*, the prosecutor would have been entitled to ask the questions and argue the case precisely as he did. *Doyle* holds that however natural the inference from silence may be the prosecutor may not undermine the implications of the *Miranda* warnings. A suspect told

that he has a right to remain silent, *Doyle* concluded, may not be bushwhacked by an argument that silence implies guilt. *Fletcher* establishes that *Doyle* applies exclusively to silence after the suspect has been informed about the privilege of silence. Nothing in this record implies that Brecht received such advise before his arraignment. Thus, as the Supreme Court of Wisconsin held, questions and arguments about silence before arraignment are proper, while the questions and remarks in closing argument concerning whether Brecht told his story "at any time" before trial stand condemned by *Doyle*, for they referred in part to post-warning silence. Our question is whether the error was harmless.

A

Whether the error was harmless depends, for reasons discussed later, on what kind of entitlement *Doyle* establishes. Does *Doyle* implement a part of the Bill of Rights, or is it instead a constitutional prophylaxis?

One possibility is that comment on silence violates the self-incrimination clause of the fifth amendment, applied to the states by the fourteenth. No state may compel a person to incriminate himself, which sets up an argument that an inference from silence is a form of compulsion to speak. The defendant made just such an argument in *Jenkins*, and the Court rejected it – at least when the accused testifies, as Brecht did. 447 U.S. at 235-39, 100 S.Ct. at 2127-30. The privilege against compulsory self-incrimination may be waived. *Raffel v. United States*, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054 (1926), holds that a defendant who takes the stand waives the

privilege to the extent of authorizing questions and comments along the line: Why didn't you tell this story earlier? Raffel testified at his second trial after keeping mum at the first. *Jenkins* holds that *Raffel* is equally applicable when the silence precedes trial. Justice Stevens, concurring in *Jenkins*, doubted the vitality of *Raffel* (treating testimony as a "waiver" is strained) but concluded that comment on silence is not *compulsion* to speak, so there is no privilege to waive. 447 U.S. at 241-45, 100 S.Ct at 2130-33. One way or the other, *Jenkins* shows that what happened at Brecht's trial did not violate the self-incrimination clause.

Doyle suggests a different rationale: Comment on silence threatens the conviction of the innocent, and thus violates the due process clause. The Court remarked that "every post-arrest silence is insolubly ambiguous", 426 U.S. at 617, 96 S.Ct. at 2244, because the suspect may be exercising his constitutional right to silence. This theme came from *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975), in which the Court found post-arrest silence too ambiguous to be an appropriate basis of inferences in federal trials. Yet if the suspect was exercising his right to silence, he could explain as much to the jury and so defuse the prosecutor's argument. That silence can carry multiple messages does not make the ambiguity *insoluble*. Few pieces of evidence standing alone support confident conclusions. Trial is an occasion for the cumulation of evidence so that one strand may illuminate another. *Bourjaily v. United States*, 483 U.S. 171, 179-80, 107 S.Ct. 2775, 2780-81, 97 L.Ed.2d 144 (1987); *United States v. Martinez de Ortiz*, 907 F.2d 629, 633 (7th Cir.1990) (in banc).

In the years since *Doyle* the Court had though better of its suggestion that no argument from silence may be presented to a jury. *Jenkins* allowed a prosecutor to urge inferences from pre-arrest silence, remarking that ambiguity "is a question of state evidentiary law." 447 U.S. at 239 n. 5, 100 S.Ct. at 2130 n. 5. *Fletcher* extended this treatment to post-arrest silence by suspects who did not receive *Miranda* warnings. Although one could have said that most suspects know of their privilege to remain silent whether or not the police tell them, and that this knowledge creates the same ambiguity mentioned in *Doyle*, the Court held that difficulties of inference are subjects for state law. *Fletcher* limited the ambiguity rationale of *Doyle* to federal cases, observing that states may draw such inferences as their domestic law permits unless the trial as a whole is fundamentally flawed. 455 U.S. at 604-05, 102 S.Ct. at 1310-11. *South Dakota v. Neville*, 459 U.S. 553, 564-66, 103 S.Ct. 916, 922-24, 74 L.Ed.2d 748 (1983), reinforced this conclusion in holding that a state may draw adverse inferences from a driver's refusal to allow a blood-alcohol test. Then *Wainwright v. Greenfield*, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986), put the icing on the cake by holding the states may not draw even well-justified inferences from post-warning silence. The prosecutor tried to distinguish *Doyle* by observing that the silence in Greenfield's case was not ambiguous, to which the Court replied that probativeness is irrelevant. 474 U.S. at 293-94 & n. 12, 106 S.Ct. at 639-40 & n. 12. The reference to ambiguity in *Doyle*, the Court now observed, just "added weight", *id.* at 294, 106 S.Ct. at 640, to the opinion's real foundation – the desire to prevent the state from undercutting the value of the *Miranda*

warnings. *Doyle* itself said as much, 426 U.S. at 617-18 n. 8, 96 S.Ct. at 2244-45 n. 8, when responding to the dissent of Justice Stevens, who wrote for the Court in *Greenfield*.

Justice White first offered the anti-mousetrapping ground in a brief opinion concurring in *Hale*, 422 U.S. at 182-83, 95 S.Ct. at 2139-40. *Doyle* and all of the opinions in its wake have quoted and adopted this view as the Court's. *Doyle* put it this way:

> [W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

426 U.S. at 618, 96 S.Ct. at 2245. *Jenkins*, which allows reference to pre-arrest silence, and *Fletcher*, which allows reference to post-arrest silence if the officers neglected to give *Miranda* warnings, emphasize that the state did not afford – and therefore could not renege on – any assurance that silence is costless. Cf. *Anderson v. Charles*, 447 U.S. 404, 408, 100 S.Ct. 2180, 2182, 65 L.Ed.2d 222 (1980) ("*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent."). *Greenfield* reinforces this understanding in the course of explaining, 474 U.S. at 292-94, 106 S.Ct. at 639-40, that even reliable inferences from silence are forbidden because they amount to governmental self-contradiction.

Doyle thus rests on a single proposition: Having implied when giving warnings that silence is safe, the government may not reverse course at trial. The rule of *Doyle* reduces the chance that *Miranda* warnings will injure the persons they are supposed to protect. *Doyle* makes the world safe for *Miranda*. But the warnings required by *Miranda* are not themselves part of the Constitution. They are designed to inform the suspects of their entitlements and so reduce the likelihood of subtle coercion of people in custody. *Oregon v. Elstad*, 470 U.S. 298, 304-09, 105 S.Ct. 1285, 1290-93, 94 L.Ed.2d 222 (1985); *New York v. Quarles*, 467 U.S. 649, 654, 104 S.Ct. 2626, 2630, 81 L.Ed.2d 550 (1984); *Michigan v. Tucker*, 417 U.S. 433, 442-46, 94 S.Ct. 2357, 2362-65, 41 L.Ed.2d 182 (1974). *Doyle* is therefore a prophylactic rule designed to protect another prophylactic rule from erosion or misuse. It has nothing to do with the defendant's guilt and everything to do with insisting that the government play straight with those it prosecutes.

B

Whether the prosecution's violation of *Doyle*'s rule in Brecht's case is harmless beyond a reasonable doubt is a question about which reasonable persons can disagree – have disagreed. The district judge and the three judges of the state's appellate court believe that the error was not harmless under this standard. Six justices of the Supreme Court of Wisconsin reached the contrary conclusion. (The seventh, Justice Ceci, did not participate in the decision.) The district judge thought her inability to deem the evidence "overwhelming" dispositive on the question. Some opinions of this court support such a perspective. E.g.,

United States ex rel. Savory v. Lane, 832 F.2d 1011, 1020 (7th Cir.1987); *Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir.1988). "Beyond a reasonable doubt" is an exacting standard. See *Yates v. Evatt*, ___ U.S. ___, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991); *Arizona v. Fulminante*, ___ U.S. ___ 111 S.Ct. 1246, 125?-61, 113 L.Ed.2d 302 (1991). The state, by contrast, submits that errors are harmless when their marginal effect is slight even though the evidence leaves room for debate. This position, too, has some support in our decisions. E.g., *Phelps v. Duckworth*, 772 F.2d 1410, 1413-15 (7th Cir.1985) (en banc); *Fencl v. Abrahamson*, 841 F.2d 760, 769 (7th Cir.1988).

We could trudge through the record and add to the score, making the count anywhere from 9-4 for harmlessness (if we should agree with the Supreme Court of Wisconsin) to 7-6 for the opposite conclusion. The antecedent question, however, is whether collateral review of state convictions in federal court is nothing more than a replay of the direct appeal, as one federal district judge and then three federal appellate judges duplicate the work of the more numerous state judges. Although arguing that duplication of effort should end in its favor, Wisconsin also urges us to revisit the question whether a federal court should apply the "reasonable doubt" standard, derived from *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), on collateral review of *Doyle* violations. *United States ex rel. Miller v. Greer*, 789 F.2d 438 (7th Cir.1986) (en banc), used the reasonable doubt test, but the Supreme Court reversed our judgment on other grounds under the name *Greer v. Miller*, 483 U.S 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987), and so deprived our opinion of authority. The Court granted

certiorari to identify the proper standard on collateral attack but did not reach the issue because, it held, there had been no error in the first place. *Id.* at 761 n. 3, 765 n. 6; 107 S.Ct. at 3106 n. 3, 3108 n. 6. Justice Stevens, who alone considered the question on which review had been granted, concluded that a distinct standard of harmlessness applies on collateral review. *Id.* at 767-69, 107 S.Ct. at 3109-11 (concurring opinion). Two other Justices have cited that opinion with approval. *Duckworth v. Eagan*, 492 U.S. 195, 212, 109 S.Ct. 2875, 2884, 106 L.Ed.2d 166 (1989) (O'Connor & Scalia, JJ., concurring). No Justice has taken a contrary view.

Not long ago a majority of this court treated the question as open. In *Hunter v. Clark*, 934 F.2d 856 (7th Cir.1991) (en banc), two judges concluded that the reasonable doubt standard should not be employed in the collateral enforcement of prophylactic rules. *Id.* at 865-66 (concurring opinion). Four other judges called the concurring opinion "persuasive" and remarked that it "may well be correct" but found it unnecessary to essay a final decision. *Id.* at 859 n. 1 (plurality opinion). The other five members of this court did not discuss the question. See also *Hanrahan v. Greer*, 896 F.2d 241, 244-45 (7th Cir.1990) (calling question open but avoiding resolution because argument had not bee preserved in district court); *Fencl*, 841 F.2d at 766-67 n. 6 (flagging question but avoiding resultion). Judges of this court have been bandying the subject about for six years, ever since *Phelps* was decided in September 1985. Although *Savory*, 832 F.2d at 1016-17 & n. 2, reiterated the approach of *Miller*, subsequent developments, especially the reservation in *Hunter*, permit renewed attention. No interest of the judicial system

(or the parties) would be served by postponing yet again resolution of a question the Supreme Court thought certworthy in 1987. The State has asked us to apply the standard of *United States v. Lane*, 474 U.S. 438, 449, 106 S.Ct. 725, 732, 88 L.Ed.2d 814 (1986), and *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946), under which only an error that exerts substantial influence on the course of the trial and produces actual prejudice to the accused vitiates the judgment. By ignoring this request, Brecht has forfeited any possibility that the state neglected to preserve the claim in the district court. (The defendant made a vigorous waiver argument in *Hanrahan*, quite unlike Brecht's strategy. We do not know whether Wisconsin made this argument to the district judge and shall not endeavor to find out.)

The standard of "harmlessness" has never been a unitary one. Contrast *Lane* with *Chapman*. It varies with the nature of the underlying right, the tools available to correct the violation at trial, and the number of layers of review. *Chapman* establishes that the standard an appellate court should employ on direct review is whether the error is harmless beyond a reasonable doubt. Does this carry over to collateral attack? The Supreme Court has never addressed that question.

We know from *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), that § 2254 does not require federal courts on collateral attack to employ for every constitutional claim the same standards state courts must use. *Stone* holds that when a defendant invokes the exclusionary rule that has been devised to implement the fourth amendment, a federal court should inquire only

whether the state gave the defendant a full and fair opportunity to litigate the claim. Error in application does not support a writ of habeas corpus. *Stone* observed that the exclusionary rule is an extra-constitutional device that helps motivate adherence to the fourth amendment, but that exclusion is not itself compelled by the Constitution. See also, e.g., *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); cf. Henry P. Monoghan, *The Supreme Court, 1974 Term – Forward: Constitutional Common Law*, 89 Harv.L.Rev. 1 (1975). It followed, the Court held, that federal courts engaged in collateral review need not replicate the efforts of the judges of the state tribunals; it is enough to ensure that states adjudicate these claims. It may well be that the Court will establish a similar system for claims under *Miranda*, which like the exclusionary rule depends on prudential rather than textual or historical support. Justice O'Connor (joined by Justice Scalia) so argued in *Eagan*, 492 U.S. at 205-14, 109 S.Ct. at 2881-86, and the majority left the issue open. 492 U.S. at 201 n. 3, 109 S.Ct. at 2879 n. 3. If *Miranda* ultimately joins the exclusionary rule, claims under *Doyle* are logical companions, for just as *Miranda* creates a buffer around the self-incrimination clause, so *Doyle* creates a buffer around *Miranda*.

Selecting a deferential standard by which to assess harmlessness is an alternative to confining collateral review as tightly as *Stone* does – an alternative that leaves the federal court with substantially greater power to ensure that the state court is taking seriously its obligation to enforce the substantive rules. It is a middle ground between federal review that duplicates the direct

appeal and federal review that is, after the fashion of *Stone*, next to no review.

For most of this nation's history "next to none" was an accurate description of collateral review of state judgments. Section 14 of the Judiciary Act of 1789 gave the federal courts jurisdiction to issue writs only when person were held in federal custody. 1 Stat. 81-82. In 1867 a Congress concerned about the behavior of states that had joined the Confederacy extended federal power to state prisoners. 14 Stat. 385-86. In 1867, as in 1789, the writ ran only to release persons held without authority – that is to say, without "jurisdiction." See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441, 463-69 (1963). One convicted by a tribunal with jurisdiction over subject-matter and person could obtain no collateral relief, however grievously the tribunal erred. Shortly after Congress extended federal power the state prisoners, the Supreme Court began pouring more into the vessel of "jurisdiction". In 1915 the Court equated a kangaroo court with lack of jurisdiction, *Frank v. Mangum*, 237 U.S. 309, 330-35, 35 S.Ct. 582, 288-90, 59 L.Ed. 969 (1915), and by 1942 the distinction between "no jurisdiction" and "grievous error" had eroded so substantially that the Court discarded the limitation. *Waley v. Johnston*, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed. 1302 (1942) (conviction based on coerced confession). Not for a further 11 years, however, did the Court first use collateral review as a supplement to direct appeal, re-deciding procedural questions (already fully considered by the state court; until *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), it had been

necessary to show an error of special gravity that undermined confidence in the verdict. That is to say, the device through which the Court expanded review beyond strictly jurisdictional claims was to equate omission of those procedures central to the protection of the innocent with the lack of jurisdiction.

If the fifteen years that followed *Brown* witnessed an extraordinary extension of federal review of state judgments, the fourteen years since *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), have experienced a movement in the other direction. *Sykes* held that forfeitures in state court also block review in federal court unless the defendant shows both external cause and prejudice – not simply that the error had an adverse effect, but that it could threaten the conviction of the innocent. Cf. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142 (1970). *Stone* effectively eliminated collateral review of claims under the fourth amendment. Recently the Court overruled *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 937 (1963), one of the milestones in the expansion of collateral review. *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991) (observing that *Fay* "was based on a conception of federal/state relations that undervalued the importance of state procedural rules."). See also, e.g., *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) (enlarging the doctrine of "abuse of the writ").

Today – as for most of our history – the Court puts considerations of finality and federalism at the forefront of any discussion of the scope of collateral review. One who seeks that review must justify the federal role; it is

not enough to cry "Constitution!". There are many shades of constitutional rules; those that protect the accuracy of the fact-finding process receive the greatest protection; rules that may be found in the text (such as the self-incrimination clause), even though they promote values other than accurate resolution of factual contests, receive greater protection than doctrines that courts have devised in the penumbras of constitutional rules. We deal with such a penumbral doctrine – one that until *Brown* would not have been open at all on collateral review.

In deciding how (even whether) a federal court should examine the state's decision concerning such a supplementary doctrine, we could recite themes of federalism and finality – but these are so trumpeted in recent opinions such as *McCleskey* and *Coleman* that repetition would be tendentious. See also, e.g., *Teague v. Lane*, 489 U.S. 288, 308-09, 109 S.Ct. 1060, 1073-74, 103 L.Ed.2d 334 (1989); *Kuhlmann v. Wilson*, 477 U.S. 436, 452-55, 106 S.Ct. 2616, 2626-28, 91 L.Ed.2d 364 (1986). One dominant theme is that doctrines protecting the innocent, and claims of actual innocence, receive special protection. See *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986) (the "cause and prejudice" preconditions to collateral review of claims forfeited in state court do not apply "where a constitutional violation has probably resulted in the conviction of one who is actually innocent."); *Kuhlmann*, 477 U.S. at 452-54, 106 S.Ct. at 2626-27 (showing of probably innocence is condition of second review of same issue). Three additional practical considerations stand out.

First, collateral review followed by a new trial means delay, often extended. Passage of time diminishes the

courts' ability to resolve factual disagreements accurately. Trials long after the event, when memories have faded, are less likely to convict the guilty and acquit the innocent. More: at a new trial there will be opportunities for new errors, which may be as bad as the error in Brecht's trial. Sometimes inaccuracy hurts the defendant, but more often it counts against the prosecution, which bears the burden of persuasion, and thus against the public interest in the accurate enforcement of the law. When the constitutional blunder diminished the accuracy of the factfinding process, then retrial even after many intervening years may make a just resolution more likely; when the constitutional entitlement is one that tolerates a reduction in accuracy (as does the self-incrimination clause) in pursuit of other objectives, again the costs of deferred trial may be worth bearing. When the rule neither promotes accuracy nor can be located in the Constitution itself – when the foundation of the doctrine is avowedly prudential – then courts must take into account all of the costs as well as the benefits. Delay makes it substantially more costly to enforce a prophylactic rule such as *Doyle* on collateral attack than on direct appeal, which implies a corresponding adjustment in doctrine. See Thomas W. Merrill, *The Common Law Powers of the Federal Courts*, 52 U.Chi.L.Rev. 1, 53 (1985).

Second, federal courts, knowing the high costs of ordering retrials many years after the events, may be inclined to dilute the standard of harmlessness while retaining the "reasonable doubt" formula, excusing errors that would not be tolerated on direct appeal. A careful reader of our opinions would find some traces of this. E.g., *Hanrahan v. Thieret*, 933 F.2d 1328, 1336 (7th

Cir.1991). State courts reading these opinions then relax their own vigilance, an unhappy consequence that could be avoided by distinguishing the standards of harmlessness on direct and collateral review.

Third, while federal courts re-do the decisions already made by state courts, federal business languishes. Time to review closed cases may be had only at the expense of time to decide pending ones. Serving as super-appellate tribunals in the state system, federal courts necessarily devote less time to cases that have yet to receive an initial decision. Less time per case means an increased chance of error. It also means a longer queue, during which disputes fester and memories fade, impairing the federal courts' ability to resolve accurately cases pending on their primary dockets. In some federal districts civil trials have become exceptional events. There are many causes of this, but each contributes at the margin, and each segment of judicial business must justify its imposition on resources the judicial system cannot control or augment.

Selecting a standard for assessing harmless error, no less than deciding when the prosecutor can use evidence the Constitution says he should not have at all, requires an assessment of the marginal benefits and costs of enforcement. The difference between a *Chapman* standard of review on collateral attack and a *Kotteakos* standard is not likely to impair the enforcement of *Doyle*. Recall that *Kotteakos* supplies the standard – whether an error "had substantial and injurious effect or influence in determining the jury's verdict", 328 U.S. at 776, 66 S.Ct. at 1253; see also *Lane*, 474 U.S. at 449, 106 S.Ct. at 732 – that

federal courts use in evaluating claims that federal statutes and rules have been violated in federal trials. No one believes that it affords insufficient protection to these federal norms. Under any of the competing definitions, the substantive rule (and review under the most stringent standard in state court) informs prosecutors that an effort to draw the jury's attention to the defendant's silence reduces the chance of conviction, and tells trial judges how to respond to the prosecutors' efforts. These two messages, unaffected by the standard of harmless error, are the principal advantages of the rule. When the rule is as far removed from protecting the innocent as is *Doyle*, there is no need for the strict enforcement that the *Chapman* standard creates.

C

What we have said would be academic if Congress or the Supreme Court has directed the application of the *Chapman* standard on collateral review. But neither institution has done this. Congress has been silent on the standard of review. Indeed, with the exception of 28 U.S.C. § 2254(d), Congress has been silent on most procedural questions. See John C. Jeffries, Jr. & William J. Stunt, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U.Chi.L.Rev. 679, 707-09 (1990). *Chapman* was a direct appeal, as are most of the other cases in which the Supreme Court applied the "reasonable doubt" standard to state convictions. That the standard of harmless error may vary between direct and collateral appeal is a commonplace. For example, a violation of Fed.R.Crim.P. 11, which establishes procedures for taking guilty pleas, is enforceable on direct appeal by

almost automatic reversal. *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). On collateral attack, however, Rule 11 is enforceable only to the extent that the disregard of its provisions makes the proceedings fundamentally unfair. *United States v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979). The difference is not attributable to the nonconstitutional status of Rule 11, for the Rule is a "law," and the pertinent statute, 28 U.S.C. § 2255, allows collateral attack on the ground that a person is in custody "in violation of the Constitution or laws of the United States". See *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974). The change in the standard of review instead rests on the conclusion that one round of review is sufficient unless something has gone very wrong indeed. Collateral review is not supposed to be a replay of the direct appeal, *Sunal v. Large*, 332 U.S. 174, 181-82, 67 S.Ct. 1488, 1492-93, 91 L.Ed. 1982 (1947), a point emphasized when the Court held in *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), that blunders that could support reversal as "plain error" on direct appeal do not support collateral relief.

The same may be said for review of state convictions. See *Henderson v. Kibbe*, 431 U.S. 145, 154 & n. 13, 97 S.Ct. 1730, 1737 & n. 13, 52 L.Ed.2d 203 (1977), which holds that only in the rarest of cases will an instruction to which no objection was made at trial support collateral attack, even though the same instruction might have been "plain error" on direct appeal. Ordinary trial errors (even constitutional ones) that might lead to reversal on appeal do not support collateral review in federal court unless

the trial as a whole has miscarried, impugning the accuracy of the judgment. See, e.g., *Darden*, *Donnelly*, *Cupp*, and *Lisenba*. Expressions throughout the *Doyle* line imply that the Court believes these cases salient. E.g., *Fletcher*, 455 U.S. at 605, 102 S.Ct. at 1311 (citing *Cupp* for the proposition that the ambiguity of silence supports a new trial only when it degrades the accuracy of the fact-finding apparatus); *Miller*, 483 U.S. at 765-67, 107 S.Ct. at 3108-10 (applying the *Donnelly* approach to determine whether a prosecutor's efforts to argue inferences from silence violate *Doyle* at all).

So far as we can tell, only twice has the Supreme Court used the *Chapman* standard on collateral attack. The first time, *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), the central question was whether an unconstitutional burden-shifting instruction *ever* could be harmless error. The Court held that it may be deemed harmless under the *Chapman* standard. The second time, *Yates v. Evatt*, required the Court to refine its holding in *Rose*, which was not entirely consistent in its explanation of *Chapman*. See 111 S.Ct. at 1892 & n. 8. *Yates* held that the Supreme Court of South Carolina erred in withholding collateral relief when it employed a standard of harmlessness at variance with *Chapman's*. *Yates* illustrates the value of the *Chapman* standard when the constitutional rule is designed to protect the innocent from wrongful conviction. South Carolina s trial court had charged the jury in a murder case not only that malice could be presumed from the use of a deadly weapon but also that malice could be presumed when the death occurs in the course of an unlawful act. Both of these presumptions had been declared unconstitutional because they allowed

the state to evade its burden of proving guilt beyond a reasonable doubt. See *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The state court, on remand from *Yates v. Aiken*, proceeded to misstate the facts and all but thumb its nose at the opinion reversing it. (It had earlier denied relief to Yates without even citing the federal cases – and this despite a remand by the Supreme Court with instructions to apply *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). See 111 S.Ct. at 1890.) So the Supreme Court again granted review and reversed, explicating the meaning of *Chapman* in burden-shifting cases.

Yates v. Evatt presents a striking contrast with our case. First, *Yates* dealt with constitutional rules designed to protect the innocent. Such rules give the strongest justification for independent federal review. *Doyle* is a penumbral rule. Second, *Yates* addressed a state court apparently unwilling to accept the federal norm; Wisconsin, by contrast, has applied *Doyle* conscientiously. Federal courts should discourage recalcitrance and reward full consideration – which they cannot if they review every constitutional claim from scratch. *Yates* reinforces rather than shakes our conviction that the "reasonable doubt" standard, compelling the state to justify the judgment with the same burden it bears before the jury in the first instance, is out of place in the collateral enforcement of prophylactic rules.

D

We hold that the standard of harmlessness on collateral enforcement of prophylactic rules is the one stated in *Kotteakos* and *Lane* – whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 776, 66 S.Ct. at 1253; see also *Lane*, 474 U.S. at 449, 106 S.Ct. at 732. The Court added in *Kotteakos* that "if one is left in grave doubt, the conviction cannot stand." 328 U.S. at 765, 66 S.Ct. at 1248. This amply protects the federal interest – and the defendant's – in enforcing rules that are unrelated to the protection of the innocent.

We recognize that *Bass v. Nix*, 909 F.2d 297, 304-05 & n. 14 (8th Cir.1990), has elected not to apply the *Kotteakos-Lane* approach to collateral review of *Doyle* errors. *Bass* is founded on a belief that the "insoluble ambiguity" language of *Doyle*, which is directed to the protection of the innocent, still represents the Supreme Court's view. As we have shown, it does not; today the probative value of inferences from silence is a question of state law. Because *Bass* rests on a misunderstanding of the justification of the *Doyle* rule, we respectfully decline to follow it.*

Application of our approach is straight-forward. Brecht does not contend that the four references to his post-arraignment silence had "substantial and injurious

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* Because this opinion creates a conflict among the circuits and changes the standard used in this circuit, it was circulated before release to all judges in active service. See Circuit Rule 40(f). A majority did not favor hearing in banc. Chief Judge Bauer and Judges Wood, Cudahy, Flaum, and Ripple voted to hear the case in bank.

effect" and could not do so with a straight face, given the many more, and entirely proper, references to his silence preceding arraignment. Brecht's sole submission, tracking the district court's conclusion, is that once any constitutional error has occurred, the judgment must be set aside unless the evidence is "overwhelming", which Brecht submits it is not. As we have rejected that approach, we conclude that the violation of *Doyle* does not support a writ of habeas corpus.

REVERSED

CUDAHY, Circuit Judge, concurring in the judgment.

I concur in the judgment.

The majority opinion pursues with considerable eloquence and skill a subject in which its author has evinced a burning interest for a number of years. *Cf. United States ex rel. Miller v. Greer*, 789 F.2d 438, 448 (7th Cir.1986) (in banc) (Easterbrook, J., dissenting), *rev'd on other grounds*, 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); *Hunter v. Clark*, 934 F.2d 856, 865 (7th Cir.1991) (in banc) (Easterbrook, J., concurring).

In *Hunter*, our most recent in bank encounter with the problem of the standard for harmless constitutional error in collateral review, Judge Easterbrook was joined only by Judge Posner.

Judge Eschbach's statement in *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1016-17 (7th Cir.1987), still accurately states Seventh Circuit law:

> With respect to the admission of statements petitioner made to police without the benefit of

> the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the standard for harmless error need not detain us long. Errors of constitutional magnitude are grounds for reversal unless they are "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *see also, e.g., United States ex rel. Miller v. Greer*, 789 F.2d 438 (7th Cir.1986) (en banc), *rev'd on other grounds*, 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); *see also United States ex rel. Allen v. Franzen*, 659 F.2d 745, 748 (7th Cir.1981). While the state suggests that perhaps some other standard is appropriate to habeas corpus actions, the law in this circuit is plainly otherwise. Although the Supreme Court was presented with an opportunity to resolve this issue in *Miller*, it found it unnecessary to reach the issue, holding instead that there had been no constitutional violation at all. Accordingly, the "harmless beyond a reasonable doubt" standard remains the law in this circuit, even where the errors are challenged on collateral review.

Judge Wood in *Hanrahan v. Thieret*, 933 F.2d 1328, 1336, 1337 n. 17 (7th Cir.1991), endorses the same general position:

> Constitutional error does not require automatic reversal. On the contrary, an otherwise valid conviction need not be set aside if the error is harmless. As the district court correctly stated, however, the standard is strict indeed. A court must be able to say confidently on the record that the error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828; *United States v. Hill*, 898 F.2d 72, 75 (7th Cir. 1990).

The same opinion continues, "The Supreme Court has yet to overrule or formally modify *Chapman* . . . and we must continue to respect its holding until that day." *Id.* at 1337 n. 17.

Given this precedent, I do not believe – whatever its merits – that this is an open question.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

November 20 , 1991

Before

Hon. Richard D. Cudahy, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Wilbur F. Pell, Jr., Senior Circuit Judge

Todd A. Brecht, *Petitioner-Appellee,* No. 91-1835 V. Gordon A. Abrahamson, Superintendent, Dodge Correctional Institution, *Respondent-Appellant.*	)	Appeal from the United States District Court for the Western District of Wisconsin. No. 90-C-603-C Barbara B. Crabb, *Chief Judge.*

Order

Petitioner-Appellee filed a petition for rehearing and suggestion of rehearing en banc on October 10, 1991. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and a majority of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

United States Court of Appeals
for the
Seventh Circuit

91-1835

Todd A. Brecht,	)	Appeal from the United
Petitioner-Appellee,	)	States District Court for
v.	)	the Western District of
	)	Wisconsin
Gordon A. Abrahamson,	)	90 C 603
	)	Judge Barbara B. Crabb
Respondent-Appellant	)	Presiding

Petition for Rehearing with Suggestion for Rehearing En Banc

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	)	

Petition for Rehearing with Suggestion for Rehearing En Banc or in the alternative a Request for Modification of the Opinion, and Judgment to Remand the case to the district Court for Application of the Standard Announced in the Panel Decision

This is a case of exceptional importance, for it involves the standard of review of *Miranda* related claims on habeas petitions in federal courts: the panel decision created a conflict of law between this circuit and the Eighth Circuit in *Bass v. Nix*, 909 F.2d 297 (8th Cir. 1990) as well as a refusal to apply the harmless error standard articulated by the Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967), which been left undisturbed by any holding of the United States Supreme Court and last assumed in *YLST v. Nunnemaker*, 59 U.S. Law Week 4808, n. 2 (June 25, 1991) in the opinion for the court by Justice Scalia as still cognizable in habeas.

The panel decision in this case is a startling example of the adversarial process going fundamentally awry. Neither the facts nor the legal conclusions and standards

stated in the panel opinion have been subjected to comment and analysis by either attorneys for the Appellee or Appellant.

The panel opinion notes that it had been circulated to all Judges of he [sic] Seventh Circuit because it creates a conflict between the circuits and changes the standard of review in the circuit. In that panel opinion fully 83 percent of all case authorities (65 cases) cited by the court's opinion had neither been cited by the State of Wisconsin nor by Petitioner-Appellee. No law review articles cited in the opinion were cited by either side. Indeed, the change of standard stems from a single footnote invitation to reconsider the harmless error standard contained in Wisconsin's brief on appeal. (Wisconsin did in fact fail to raise that issue at the District Court level, but Counsel for Petitioner-Appellee inadvertently, and incorrectly, believed it had.) No further argument appeared in Wisconsin's briefs. The state's briefs focused, as did Petitioner-Appellee's brief, on the application of the harmless error standard.

Briefing in this case was extraordinarily expedited. Wisconsin filed its original brief on May 24, 1991. Counsel on appeal was not appointed by this court until May 29, 1991. Counsel was required to immediately respond to a substantial motion by Wisconsin to stay release. Appellee's response to Wisconsin's release motion was filed on June 7, 1991. The court granted the government's stay motion on June 18, 1991, and on that same date, without prior notice to counsel for Petitioner-Appellee, ordered both expedited briefing and set oral argument. Petitioner's brief was due by noon of June 24, 1991, and oral argument set for July 10, 1991. Petitioner's attorney had

less than 5 days actual notice of the due date of the brief and responded as best possible during that time period considering the extensive record involved.

The difficulty of the case under review is illustrated by the fact that each court in turn to consider the case has reversed the decision of the court which last decided it. Such reversals indicate the closeness of this case, a single issue case: i.e. Whether Todd Brecht *intentionally* killed his brother in law, the District Attorney of Buffalo County, Wisconsin?

There was no contest as to who shot Mr. Hartman, nor was there any contest or dispute about where the shooting took place until the panel decision in this case moved the site of the shooting in blatant disregard for the record. If Mr. Hartman was not shot intentionally, Wisconsin has already held Mr. Brecht beyond the maximum sentence for the lesser offense charged to the jury.

The statement of facts in the panel opinion startlingly and substantially misstates the record, and in substantial part disregards the record. These misstatements are so serious that it is impossible to understand that a difficult task would remain in applying the new standard to the complex facts of the case to the only issue at dispute – *intent*.

At oral argument it was distinctly insisted, and Todd Brecht continues to insist, that under any standard of review short of complete deference to the last state court decision, Mr. Brecht is still entitled to the grant of the writ under federal law. This includes the standard articulated for the first time in this case (a standard which differs from that asserted by Judge Easterbrook in dissent in,

U.S. ex rel. Miller v. Greer, 789 F.2d 438, at 448 (7th Cir. 1986) which was either: " 'had substantial influence' on the course of the trial . . . ," or " 'actual prejudice' . . . a significant likelihood of altering the verdict.").

The panel opinion fails to mention the only direct testimonial statement by Roger Hartman, made shortly after the shooting, in direct and apparently full conscious response to a neighbor's question, "Did he [Todd Brecht] have something anything against you?" "ANSWER, I DON'T KNOW." (Record 164, 175)

The prosecution tried to fill this lacunae on intent with theories of motive based on homosexuality, either irritation about conditions for staying in the Hartman house until another facility would be available, conditions restricting his drinking or homosexual activity in the house, or cupidity, (with a hint of homosexuality) i.e. Brecht's sister would inherit Hartman's property and Brecht could then bail out a "brother" from jail in Georgia. (Brecht would then need $1,000)

The government's lever to move the jury to its view on intent was Todd Brecht's total lack of credibility (R. 608, 619, 791); the lever's fulcrum was Brecht's failure to label the shooting an accident prior to hearing the government's case at trial, [Although Brecht's attorney had stated in opening argument Brecht's accident defense in considerable detail, details that coincided with Brecht's actual testimony to the jury]; and the heaviest weight on that lever were the inferences, surmises and theories based upon Todd Brecht's admitted homosexuality.

Each and every reviewing court has found that federal constitutional error had been committed through the

state's adverse comments on silence that embraced the period after arraignment at which Miranda warnings were first documented to have been given.

Besides the important new ruling of law, the panel of this court made new and creative findings of fact, and inferences of fact which themselves cannot withstand adversarial testing (many of these findings of fact and theories have never been advanced by the state). Many findings of fact and arguments are squarely contradicted by the evidence actually admitted at trial, as well as contradictory to the theories and arguments actually advanced by the prosecution at trial.

Among other startling items asserted for the first time in the panel opinion are the following:

1) The site of the killing is moved from inside the house to outside the house (Opinion p. 3, "near the pool (where Roger was shot)";

a) This ignores uncontradicted physical evidence including the spent bullet and cartridge shell found inside the house about 240 inches apart (R. 240, 252, 224, 250-252, 246, 298).

b) It also ignores the *only* argument by the state to suggest a theory different from the defendant's as to where the shooting occurred, an ambush theory also set inside the house but at a slightly different place on the basement (or lower) level, R. 810, (responded to at R. 845). The prosecution neither argued nor suggested the shooting took place anywhere other than inside the house. Indeed, the prosecution stated the shooting took place inside the house in its

opening and closing statements (R. 116, 812, 881).

c) Most importantly it ignores Roger Hartman's own statement, "I sneaked out the basement door . . . " (R. 167) which puts the shooting inside the house. Persons at the house where Roger sought assistance also understood the shooting took place in the basement and told police offers that (R. 221).

2) A pool is moved around the house to the patio side (sometimes referred to as the porch), "The rifle was found on the patio near the pool (where Roger was shot)" (Opinion, p. 3). Nowhere in the record is the patio stated to be near the pool although such confusion is understandable considering the complex testimony in the case and the failure to have a single exhibit on appeal diagramming the house. (The opinion also moves the master bedroom from one floor to another; see item 9 below.)

3) The opinion fabricates a non-existent, "raided" gun cabinet (Opinion, p. 2) as the source of the weapon, although all testimony indicates guns were stored inside bedroom closets, and the weapon involved came from Todd Brecht's bedroom closet, (R. 406, 582, 267-68).

4) Cans of beer that are testified to have come from a refrigerator (R. 581), instead come from a liquor cabinet never mentioned in the record, (Opinion p. 2), (liquor bottles were underneath a bar (R 573, 274, 127). Neither gun cabinet nor liquor cabinet appears anywhere in the record.

5) The word "assassin" was introduced as if it was used by the decedent (which it was not), and indeed the

only time anything vaguely similar to such a word was employed, the word "assailant," the trial judge ordered the word struck from the record. (R. 154)

6) The caution by the Hartmans that Brecht was not to engage in homosexual activity at their home is dramatized by the panel opinion as "at the prison gate," (Opinion p. 2) which contradicts the only specific information in the record, Molly Hartman's possibility that it was discussed on the ride home from Georgia to Wisconsin (R. 417) and Todd Brecht's statement that it was discussed on the way back from Georgia (R. 571). (The importance of the house rule is thereby dramatized by suggesting that Brecht would have remained in prison if he didn't accept this house edict!)

7) Highly probative facts are ignored, including the statement by Mr. Hartman that he didn't know what reason Brecht may have had against him, (R. 164, 175), and that the Todd Brecht, despite his motivation from cupidity, fled the scene without weapon, credit card, or checks, but with 25 cents in his pocket. (R. 361, 364 (or $1.30, according to Brecht (R. 598))

8) The court describes Brecht as a heavy drinker, a term neither used by witnesses nor by attorneys.

9) Unclear facts are stated as givens. These facts include a finding that Brecht made the phone system inoperative by taking a phone off the hook upstairs (Opinion p. 2) [which also moves the Hartman bedroom from downstairs to upstairs: The phone in the kitchen wall was on the hook, (R. 222, 244) police went downstairs where there was a bedroom, (R. 223) a master bedroom (R. 247, 253) where the phone was off the hook

(R. 255), which is the level at which the shooting took place.] In fact Todd Brecht testified he could not remember leaving the phone off the hook (R. 645) [Indeed, it was not until October 8, 1991, that it occurred to counsel for Mr. Brecht that the open phone in the downstairs bedroom could have been caused by Mr. Hartman between the time he was shot, and the time he sneaked out of the basement to seek aid at a neighbors house. (R. 883) During this period of time it is clear that Todd Brecht did not know where Roger Hartman was. This argument is also one never advanced to the jury, thus outside the record, but also is more consistent with the trial record than many of the theories advanced by the panel opinion.]

Most of these particular inaccuracies were artfully employed by the panel opinion to suggest irrefutable evidence of an intentional killing.

Other inaccuracies include the statement, "Twice the prosecutor asked Brecht whether he told anyone at *any* time before trial that the shooting was accidental . . . " (p. 4) Such questions were in fact 'never' asked of Mr. Brecht.

The actual questions of Brecht are contained in the District Court opinion at 759 F.Supp. 504.

Such fundamental factual problems in exploring the complex record in this case demonstrate the wisdom of the ordinary appellate practice of leaving primary responsibility for factual analysis to trial courts, and limiting the role of appellate panels to scrutiny of the results of the trial court. The danger of error is real if a judge

with a "burning interest" in an issue (Concurring Opinion p. 25), however important the particular issue, makes the case fit the issue.

The principal issue of law decided in the panel opinion (an issue on which 5 judges voted to rehear en banc,) was mentioned only in a brief footnote to the government's initial brief. At oral argument, brief discussion of the substance of alternative standards of review on habeas took place. Petitioner's position was that under any standard of review chosen by the court, including, the standard set out in the panel opinion, a retrial was required because the constitutional errors fundamentally tainted the truth finding function of the jury at Petitioner's trial.

The panel decision in this case resolves an important issue of federal law and creates a conflict between the circuits on the basis of virtual total absence of briefing and argument about the important policy and legal matters involved. In the short time available to file a brief in this case, Petitioner responded with a statement of the existing standard, and subsequently by letter noted a recent Supreme Court decision which inferentially continued the validity of that standard, *Yates v. Evatt*, 111 S.Ct. 1884 (1991). Counsel was not aware of the footnote in *YLST v. Nunnemaker*, 59 L.W. 4808, 4810, n.2 (1991) which reflects the court's assumption that *Miranda* claims were still cognizable on habeas at least as of June 25, 1991. (*YLST* was not cited in the panel opinion.)

There are substantial legal issues that Appellee would request permission to brief that are important to its consideration of the proper role of federal courts in

exercising habeas corpus jurisdiction. The panel opinion states that the Supreme Court has overruled *Fay v. Noia*, 372 U.S. 391 (1963) citing *Coleman v. Thompson*, 111 S.Ct. 2446, 2565 (1991). That is incorrect, although some other courts have also drawn the same conclusion.

Fay v. Noia, was indeed modified by the adoption of a cause and prejudice test in *Francis v. Henderson*, 425 U.S. 536 (1976), and *Wainwright v. Sykes*, 433 U.S. 72 (1977), and most recently *Coleman v. Thompson*, 501 U.S. ___, 115 L.Ed. 2d 640, 111 S.Ct. ___ (1991). Indeed, review of the specific holdings stated in *Fay v. Noia* by Justice Brennan at 372 U.S. 398-399 indicates that most of *Fay v. Noia* continues to be an accurate description of habeas corpus law, and in particular federal jurisdiction continues to exist in section 2254 cases. The fundamental relationship of state and federal law contemplated by *Fay v. Noia*, has not been drastically altered, certainly not as much as premature reports of *Fay v. Noia's* demise might indicate.)

What is true about *Fay v. Noia*, is that specific applications such as the deliberate bypass test are no longer applicable and instead a cause of prejudice test applies. *Coleman v. Thompson*, 501 U.S. ___, 115 L.Ed. 2d 640, 669, 111 S.Ct. ___. Until either the Supreme Court or Congress acts further, the essence of *Fay v. Noia* persists and that is a command that federal courts are to scrutinize the basis for detention *simpliciter*.

However, the present case doesn't involve any argument regarding failure to raise and preserve constitutional allegations.

It is also true that although *Fay v. Noia* has been substantially modified by subsequent decisions of the

Supreme Court, its original holdings as then stated, are surprisingly unmodified and remain at the core of Section 2254 jurisprudence. *Fay v. Noia's* major impact was recognition of the fundamental reallocation of federal and state power accomplished by Section 2254.

That is the major issue presented by the panel opinion in this case: The proper allocation of federal and state power in this area.

Fifth amendment rights to remain silence [sic] are not *just* constitutional claims, they are a fundamental protection against government overbearance upon the individual. The *Miranda* guarantee that relates to the right to remain silent is fundamentally different from *Stone v. Powell,* 428 U.S. 465 (1976) issues. Unconstitutionally obtained physical evidence does not lose its capacity to demonstrate truth through police malfeasance. A gun or bag of cocaine doesn't become untrue just because the constable blundered.

That is not the case with compelled utterances from defendants, or with penalizing the right to remain silent. Such penalties exert just that form of governmental overbearance that is at the core of the Fifth Amendment privilege. On the one hand, silence is itself neither "true" nor "untrue" regardless of whatever half-baked psychological assumptions some people may believe. Neither is speech itself always true, including confessions to murder. Indeed, counsel is aware of the intense skepticism of Chicago homicide detectives to homicide confessions. Frequently such persons, even after passing lie detector tests, have been demonstrated not to have committed a murder, usually by finding the actual murderer along

with physical or other evidence establishing truth in the matter.

Brecht's statements prior to trial are not at issue in this case. They include his statements to or overheard by police that it was a "big mistake" (R. 721, 723), or his telephone conversation from the jail on the night of his arrest that "he didn't want to shot [sic] anybody, and didn't mean to kill anybody, and didn't mean for anybody to get murdered" (R. 727). [Nor does this explain the government's failure to attempt to rebut Brecht's claimed statement on the night of arrest to his stepfather that it was an accident (R. 601) (By calling his stepfather).] [It is also unclear in the record why another statement by Brecht was not submitted to the jury, a statement shortly after his arrest that "he was always running from something he did not do." (R. 60)]

The undisputed issue in this case is the potential effect on the jury of the state's repeated use of Brecht's silence to impeach him before the jury with comments and questions that clearly violated his constitutional rights.

The essence of the writ of habeas corpus is testing the legality of restraint of an individual.

By denying the application of the adequate and independent state ground doctrine, *Fay v. Noia* held that a case or controversy existed permitting federal courts to decide the *original* Section 2254 action. Such cases are *not* a further level of appeal of state criminal actions. Section 2254 cases continue to be "original civil remedies for the enforcement of the right to personal liberty." As stated in *Fay v. Noia,* "The jurisdictional prerequisite is not the

judgment of a state court but detention simpliciter." 372 U.S. 430, 9 L.Ed. 2d 864. *Coleman v. Thompson*, itself recognizes a continued, albeit narrowed, role for federal courts in such cases.

Until either Congress or the Supreme Court decides that the scope of the fundamental writ should be narrowed, a writ so fundamental it was not left to the bill of rights but mentioned in the original body of the Constitution, (Article I, Section 9, cl. 2, Suspension Clause) and included in the Judiciary Act of 1789, Section 14, 1 Stat. 81, 82., with all due respect it is submitted this court should not act to limit that writ. It is particularly inappropriate when the request was neither presented to the U.S. District Court, nor briefed to this court. The apparent rush to judgment presented in the appellate representation of Todd Brecht accentuates the problem.

Moreover, the reason for not speaking first asserted at trial by Todd Brecht distinctly was that he did not want to give up his rights by speaking. (759 F. Supp. 504) This is an assertion that he did not want to give up a right, understandable in context as a federal right, which presents the type of claim recognized in *Carrington v. Rash*, 380 U.S. 89 (1965). Such a claim parallels the first use of habeas corpus against state custody, a use that predates the 1867 federal statute discussed in the panel opinion at 16-17. That use was to protect persons acting under federal authority who were being detained in state custody, a reaction to the North Carolina Nullification ordinance. Force Act of March 2, 1833, c. 57, sec. 7, 4 Stat. 434, 435. See, *Fay v. Noia*, 371 U.S. 401, n. 9.

Since the panel opinion fails to identify any opinion of a Justice of the Supreme Court suggesting the application of the standard adopted by the panel to *Miranda* right to silence claims, since it appears to have ignored the *YLST* footnote announced on the same day as *Coleman v. Thompson* indicating such claims retained vitality, and since the adversarial process has so fundamentally gone awry in this case:

The Appellee respectfully requests a rehearing and suggests a rehearing en banc; in the alternative, Appellee requests that this court modify its opinion to correct the many errors unsupported by the record and remand this case to the District Court for consideration of the application of this court's standard to the facts of the case. In the event that either rehearing is ordered or the suggestion for rehearing en banc is accepted, it is suggested that Appellee be permitted to file a brief on the appropriateness of any alteration of the harmless error standard, the appropriateness of alternative standards, and the application of alternative standards to the facts of the instant case. Appellant should be given similar opportunity to file briefs.

Respectfully submitted,

/s/ Allen E. Shoenberger
Allen E. Shoenberger
Court Appointed Counsel

Supreme Court of the United States

No. 91-7358

Todd A. Brecht,

Petitioner

v.

Gordon A. Abrahamson, Superintendent,
Dodge Correctional Institution

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 by the petition.

June 8, 1992

Supreme Court, U.S.
FILED
AUG 11 1992
OFFICE OF THE CLERK

No. 91-7358

In The

Supreme Court of the United States

October Term, 1992

TODD A. BRECHT,

Petitioner,

v.

GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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Question Presented

Whether, when considering violations of *Doyle v. Ohio* in federal habeas corpus proceedings, it is consistent with constitutional due process and the Sixth Amendment right to trial by jury to abandon the standard of review of whether constitutional error was harmless beyond a reasonable doubt and substitute the standard of whether the error substantially affected the course of the trial.

Parties to the Proceeding

The parties to the proceedings in the court below were Gordon A. Abrahamson, Superintendent Dodge Correctional Institution, and Todd A. Brecht.

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OPINIONS BELOW

The opinion of the Court of Appeals of Wisconsin is set out in 405 N.W.2d 718 (1987) a copy of which is contained in the Joint Appendix at 38.

The opinion of the Wisconsin Supreme Court is set out at 143 Wis.2d, 297, 421 N.W.2d 96 (1988), a copy of which is contained in the Joint Appendix at 50.

The opinion of the United States District Court for the Western District of Wisconsin is set out at 759 F.Supp. 500 (1991), a copy of which is contained in the Joint Appendix at 74.

The opinion of the United States Court of Appeals for the Seventh Circuit is set out at 944 F.2d 1363 (1991), a copy of which is contained in the Joint Appendix at 98.

The order of the United States Court of Appeals for the Seventh Circuit denying a petition for rehearing with suggestion for rehearing en banc is contained in the Joint Appendix at 131, with the Petition for rehearing with suggestion for rehearing en banc contained in the Joint Appendix at 132.

The order of the Supreme Court of the United States granting certiorari limited to issue I of the Petition for Certiorari and leave to proceed in forma pauperis is contained in the Joint Appendix at 148.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit, reversing the grant to Petitioner of a writ of habeas corpus was filed on September 26, 1991 and appears in the Joint Appendix at 98.

Petitioner's subsequent Motion for Rehearing and Suggestion for Rehearing En Banc, contained in the Joint Appendix at 132, was denied by the United States Court of Appeals for the Seventh Circuit on November 20, 1991 which order appears in the Joint Appendix at 131.

The jurisdiction of this Court is conferred under 28 U.S.C. Section 1254 (1) and Rules 10(1)(a) and 10(1)(c) of this Court.

A petition for certiorari was duly filed in this Court, which petition was granted on June 8, 1992, which order is contained in the Joint Appendix at 148.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V provides in pertinent part: "No person shall be . . . deprived of life, liberty or property, without due process of law. . . . "

The United States Constitution, Amendment XIV provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property without due process of law . . . "

The United States Constitution, Amendment VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . . "

The United States Constitution, Article I, Section 9, cl. 2 provides in pertinent part: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety may require it."

Wisconsin Statutes Sections 940.01 and 940.08 (West, 1982) in pertinent part are as follows:

"940.01 – First-degree murder

1) Whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.

2) In this chapter 'intent to kill' means the mental purpose to take the life of another human being."

"940.08. – Homicide by negligent use of vehicle or weapon

1) Whoever causes the death of another human being by a high degree of negligence in the operation or handling of a vehicle, firearm, airgun, knife or bow and arrow is guilty of a Class E felony.

2) A high degree of negligence is conduct which demonstrates ordinary negligence to a high degree, consisting of

an act which the person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another."

STATEMENT OF FACTS

The facts are stated in the opinion below by the United States District Court for the Western District of Wisconsin at Jt. App. 75-87. For purposes of the issue in this case involving improper use of Defendant's silence after arrest, the prosecutor also made the following statements in closing argument:

> "This case is basically one of credibility." Jt. App. 29.
>
> "He sits back here and sees all our evidence go in and then comes out with this crazy story . . . " Jt. App. 31.
>
> "[T]he only truthful thing he said this entire week is that he's a lier. (sic)" Jt. App. 32.
>
> "Now he's with Officer Papke and he tells him nothing. . . . " Jt. App. 33.
>
> "That's the sort of guy Todd Brecht is. He always wants to talk to somebody, until the opportunity presents itself." Jt. App. 33.
>
> (Final closing argument)
>
> "First of all there has not been a single piece of independent evidence received to corroborate anything Todd Brecht said from that witness stand. It is his cockamamie story that he wants you to believe and which is carefully woven as I said before, to fit in with all the State's evidence." Jt. App. 35.
>
> "There is no other evidence other than his story as part of the defense, nothing." Jt. App. 36.
>
> "He said he wanted to talk to the detectives. Well Polus and Papke weren't good enough. Seven guys on the Buffalo County Sheriff's Department, two of them are there with a warrant and does he say anything? Mr. Ridgways said, 'what would you say?' I know what I'd say, I'd say 'hold on, this was a mistake, this was an accident, let me tell you what

happened,' but he didn't say that did he. No, he waited until he hears our story." Jt. App. 36
"Why didn't he tell the Police about it being an accident." Jt. App. 37

SUMMARY OF ARGUMENT

The harmless error standard articulated by the court in *Chapman v. California* has deep roots in the American legal system. The standard has been applied in all federal and state jurisdictions to protect the ancient right to a trial by jury. This court, as well as all of the United States Courts of Appeals for the various circuits have understood the *Chapman* standard to be applicable on habeas. Review of congressional debates over the last quarter of a century confirms that at various times Congress has considered the standard, failed to change it, and in effect ratified the standard. Most recent considerations by Congress of this court's decision in *Arizona v. Fulminante* confirm Congressional understanding that the harmless error standard is the bedrock of constitutional protection, including the sixth Amendment right to a jury trial.

Examination of the historical understanding of the meaning of a jury trial both in English and American legal history, confirms the deep roots protecting the jury right. Those roots include deference to the jury for determining facts, and drawing inferences from those facts as well as application of law. Recent psychological research confirms the ephemeral nature of any post hoc attempt to peer deeply into any specific constitutional error's impact upon complex decisionmaking.

This court should continue the harmless error standard on collateral review of state convictions, to evidence the importance of the writ of habeas corpus, to maintain parallel structure with the test available for state convictions on direct review. Continuance will maximize the deterrent impact against prosecutors who may be tempted to shade constitutional guarantees. It would continue as well the historic constitutional and statutory understanding that the federal courts are the ultimate guarantors of federal constitutional rights. The new standard suggested by the judgment under review may increase the burden upon lower federal courts in habeas

cases, and certainly would encourage state judges, prosecutors and police to commit constitutional wrongs against citizens.

In the particular case, the constitutional violation pierces to the heart of the jury fact finding process, directly into the evaluation of multiple inferences from undisputed facts. Constitutional error such as the ones at bar have direct impact on the truth finding functions of the jury. Not only do such errors introduce insoluble ambiguity and uncertainty into the criminal trials, with routine impairment of the jury's truth finding function, but they also did so in the case at bar.

ARGUMENT

In this case the only contested issue is whether the death resulted from an intent to kill or a tragic accident. The American legal system assigns the power and duty to determine that intent to a jury, and not to a reviewing court. Once a reviewing court has determined that error is both constitutional error and error that cannot be denominated "harmless," retrial is required.

Since the error in Mr. Brecht's case is so central to the prosecution's theory of the case, the writ of habeas corpus should issue. It is suggested that the original understanding of "harmless error," which may not be all that different from material error, error that may have affected the jury verdict or impacted upon the jury deliberation, should apply. The original grant of the writ of habeas corpus by the United States District Court for the Western District of Wisconsin should be reinstated.

I. THE HARMLESS ERROR STANDARD IN AMERICAN LAW

The harmless error standard became deeply ingrained in American jurisprudence this century. All 50 states, the District of Columbia and Guam, have adopted and apply the constitutional harmless error standard of *Chapman v. California*.[1] Indeed, both state and federal courts frequently apply

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[1] See, *Ex Parte Wilson*, 571 So. 2d 1251, 1265 (Ala. 1990); *LaVigne v. State*, 812 P.2d 217, 220 (Alaska 1991); *State v. Fulminante*, 778 P.2d 602, 610,

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some variety of harmless error standard (not always involving alleged constitutional error).[2]

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629 (Ariz. 1989), reversed by *Fulminante v. Arizona*, ___ U.S. ___, 111 S.Ct. 1246, 113 L.Ed. 302 (1991) (reinstating harmless error standard in original opinion of June 16, 1988); *Logan v. State*, 773 S.W.2d 413, 415-16 (Ark.1989); *People v. Clair*, 828 P.2d 705, 729 n.10 (Cal. 1992); *Bartley v. People*, 817 P.2d 1029, 1033 (Colo. 1991); *State v. Walker*, 537 A.2d 1021, 1028 (Conn. 1988); *Van Ness v. U.S.*, 568 A.2d 1079, 1089 (D.C. App. 1990); *Alston v. State of Delaware*, 554 A.2d 304, 309 (Del.Supr.1989); *Florida v. Delva*, 575 So. 2d 643, 649 (Fla. 1991); *Zant v. Beck*, 386 S.E.2d 349, 350 (Ga. 1989) (On State habeas); *People of Territory of Guam v. Viloria*, 1991 WL 255858 (D.Guam App. Div. 1991); *State v. Lincoln*, 825 P.2d 64, 71 (Haw. 1992); *State v. Fain*, 809 P.2d 1149, 1152 (Idaho 1991); *People v. Simms*, 520 N.E.2d 308, 315-6 (Ill. 1988) (use in sentencing phase of capital punishment case questioned); *Morgan v. State*, 469 N.W.2d 419, 427 (Iowa 1991); *Reid v. State*, 529 N.E.2d 1309 (Ind. 1988); *Paenitz v. Commonwealth*, 820 S.W.2d 480, 481-2 (Ky. 1991); *State v. Getz*, 830 P.2d 5, 11 (Kan. 1992); *State v. Sullivan*, 596 So. 2d 177, 184-85 (La. 1992); *State v. Watson*, 580 A.2d 1067, 1072 (Md. 1990); *State v. Ingalls*, 544 A.2d 1272, 1275-6 (Me. 1988); *Commonwealth v. Doherty*, 578 N.E.2d 411, 416 (Mass. 1991); *People v. Banks*, 475 N.W.2d 769, 778-79 (Mich. 1991); *State v. Naylor*, 474 N.W.2d 314 (Minn. 1991); *Clemons v. State*, 593 So.2d 1004, 1006-7 (Miss. 1992); *State v. Kilgore*, 771 S.W.2d 57, 62 (Mo. banc 1989); *Brodniak v. State*, 779 P.2d 71, 73-74 (Mont. 1989); *State v. Timmerman*, 480 N.W.2d 411, 420 (Neb. 1992); *Redmen v. State*, 828 P.2d 395, 400 (Nev. 1992); *State v. Williams*, 581 A.2d 78, 80-81 (N.H. 1990) (per curiam); *State v. Marshall*, 586 A.2d 85, 147-49 (N.J. 1991); *State v. Jett*, 805 P.2d 78, 81 (N.M. 1991); *People v. Hamlin*, 525 N.E.2d 719, 721 (N.Y. 1988); *State v. Huff*, 381 S.E.2d 635, 653-54 (N.C. 1989); *State v. Kelley*, 450 N.W.2d 729, 732 (N.D. 1990); *State v. Jenks*, 574 N.E.2d 492, 509 (Ohio 1991); *Walker v. State*, 795 P.2d 1064, 1069 (Okl. Cr. 1990); *State v. Williams*, 828 P.2d 1006, 1011-12, 1019, n. 17, (dissent) 1026 et seq. and 1030 (Or. 1992); *Commonwealth v. Lewis*, 598 A.2d 975, 980-81 (Pa. 1991); *State v. Fayerweather*, 540 A.2d 353, 354 (R.I. 1988); *State v. Simmons*, 417 S.E.2d 92, 94 (S.C. 1992); *Satter v. Solem*, 458 N.W.2d 762, 769-770 (S.D. 1990) (state habeas); *State v. Neal*, 810 S.W.2d 131, 138-39 (Tenn. 1991); *Cook v. State*, 821 S.W.2d 600, 603, 605-8 (Tex. Cr. App. 1991); *State v. Johnson*, 823 P.2d 484, 488 (Utah 1991); *Goins v. Commonwealth*, 237 S.E.2d 136, 138 (Va. 1977); *In Re Fisher*, 594 A.2d 889, 896 (Vt. 1991); *State v. Scott*, 757 P.2d 492, 495 (Wash. 1988); *State v. England*, 376 S.E.2d 548, 555 (W.Va. 1988); *State v. Webb*, 468 N.W.2d 694, 695-7 (Wis. 1991) (Per Curiam); *Campbell v. State*, 589 P.2d 358, 367 (Wyo. 1979).

[2] As of July 17, 1992, Westlaw contained discussion of harmless error in 36,161 documents on the Allstates or Allstates-Old databases, and 9,910 documents on the Allfeds or Allfeds-Old databases. The comparable Lexis databases

(Continued on following page)

The judicial use of the term harmless error is largely confined to the twentieth century. For example, only 92 reported federal cases on Westlaw prior to 1900 employ the term, and in most cases the term was used only by the headnote writer.[3]

None of these 19th century federal cases was concerned with "harmless error" in the context of constitutional error. Ordinarily the 1890s use of the term was in the context of "material" error; see headnote to *Reed v. Stapp*, 52 F. 641 (7th Cir. 1892).[4]

A. Congressional Enactment of the First Harmless Error Standard Evidenced Concern About Improper Interference with Jury Functions.

Shortly after headnote writers popularized the term "harmless error" Congress began debating the concept starting in 1911 and in 1919 enacted the first federal "harmless error" standard. The debate demonstrated the difficulties attendant upon attempts to reallocate decision power from the

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include 38,486 state documents and 11,719 federal documents. [State Omni and Genfed-Omni]

[3] The 12 exceptions (all but one in the 1890s) are: *Western Ins. Co. v. Goody Friends*, 29 Fed. Cas. 764 (S.D. Ohio 1861); *Jones v. Allen*, 85 F. 523 (8th Cir. 1898); *Dun v. Maier*, 82 F. 169 (5th Cir. 1897); *Coloritype Co. v. Williams*, 78 F. 450 (1897); *Iowa State Traveling Men's Ass'n v. Moore*, 73 F. 750 (7th Cir. 1896); *Delaware, L. & W.R. Co. v. Roalefs*, 70 F. 21 (3rd Cir. 1895); *St. Louis, I.M. & S. Ry. Co. v. Phillips*, 66 F. 35 (8th Cir. 1895); *Chicago, R.I. & P. Ry. Co. v. Caulfield*, 63 F. 396 (8th Cir. 1894); *MacDonald v. U.S.*, 63 F. 426 (7th Cir. 1894); *Bracken v. Union Pac. Ry. Co.*, 56 F. 447 (8th Cir. 1893); *Kellogg v. Clyne*, 54 F. 696 (8th Cir. 1893); *Croxby Lumber Co. v. Smith*, 51 F. 63 (3rd Cir. 1892).

[4] The headnote reads: "Review on Appeal – Harmless Error. Where there is a special finding of facts to support the judgment the admission of immaterial evidence, not affecting such findings, is harmless error." The court stated: "These facts are sufficient to bar a recovery. The admission of immaterial evidence not affecting that finding could not, therefore, injure the plaintiff, and constitutes no ground for reversal . . . . " (52 F. 645). A similar pattern of use exists in the state courts. Although there were 659 state cases which used the term "harmless error" prior to 1900, in most of these cases the term was used only by the headnote writer. For examples see, *Hobbs v. People*, 55 N.E. 692 (Ill. 1899); *People v. Garcia*, 59 P. 576 (Cal. 1899); *State v. Leieume*, 26 So. 992 (La. 1899).

jury to the court as well as the close constitutional ramifications upon the jury trial right.

The first draft language was attributed to a commencement speech by President Taft[5] (before his election).[6] The context of the harmless error proposal was an assumption that the most miniscule or technical errors required the reversal of a conviction.[7]

In 1912 Congress continued its discussion of the 1911 harmless error proposal conjoined with a proposal providing for special verdicts in civil cases.[8]

An intense and instructive debate resulted about the relationship of the court and jury. Senator Heyburn of Idaho,

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[5] "The Administration of Criminal Law," 15 Yale Law Journal 1 (1905). The speech considered the comparative advantages of civil law and common law in establishing legal systems for Puerto Rico and the Philippines under their new "American sovereignty!" It was by no means a clear proposal to change "American law."

[6] House Report 1949, 61st Congress, 3d Session (1911) (To accompany H.R. 31165). Earlier President Taft had lauded the common law writ of *habeas corpus*, praising the "practical remedy of the writ" as "but one of many instances in which our Anglo-Saxon ancestors hammered out their civil liberty by securing from their would-be royal oppressors not general declarations of principles of freedom like a French constitution, but distinct and definite promises that certain rules, not of substantive, but of adjective law should obtain. To them it was the securing of the means by which they could themselves secure their liberty,. . . . " 15 Yale Law Journal 3.

[7] House Report No. 1949 cited as an example of a technical error the reversal of a conviction because the indictment did not read "against the peace and dignity of the State," but omitted the word "the" so the indictment read "against the peace and dignity of State." House Report 1949, 61st Congress, 3d Session, p. 2 (1911). The decision cited for this hypertechnical error was *State v. Campbell*, 109 S.W. 706 (Mo. 1908). The Missouri Supreme Court first seriously considered whether the error was "harmless," but rejected the conclusion.

[8] The text under discussion provided: "No judgment, decree or order shall be set aside or reversed . . . on account of any error which does not injuriously affect the substantial rights of the party complaining. . . . " The text went on to permit a trial judge to submit specific issues of fact to the jury and gave power to that judge and any court on writ of error to enter a judgment either on the verdict or upon the special findings, if conclusive. The special findings language differed substantially from the current, limited power given federal judges regarding special interrogatories contained in Rule 49 (b), Federal Rules of Civil Procedure.

vigorously opposed the bill in debate with Senators Sutherland, Borah, and Root (inter alia). Senator Heyburn's primary objection was to the special verdict language, but he raised doubt about the "injurious impact upon substantial rights" section as well, which he saw as raising difficulties parallel to determinations of whether errors are *material* errors. Congressional Record – Senate, 11774, August 24, 1912, 62nd Congress, 2nd Session.[9]

Senator Heyburn cautioned about uncontrolled discretion in any person, judges included. He cautioned against hasty action on the assumption that one knows the correct application of law to a particular situation. Senator Heyburn stated:

> "but I have had to stand in a miner's meeting where there was no law within reach and to perform the same duty, keep the curb upon the impulses of men to disregard established methods and principles of justice. I have seen them rush forward to seize a man's property because of what they thought the law should be, or to take his life because of what they thought the law should be." Congressional Record – Senate 11774-5, August 24, 1912, 62nd Congress, 2nd Session.

Senator Heyburn saw the proposal as [obnoxious] interfering with the right to trial by jury:

> "The right of trial by jury means a verdict by the jury. The only possible conclusion of a jury trial is a verdict by the jury, and this proposes to substitute for that, at the option of the judge – which adds to

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[9] The language "material error" was the closest language used to "harmless error" by the Supreme Court during the 19th century, appearing first in Chief Justice Taney's opinion for the court in *Dred Scott v. Sandford*, 60 U.S. 393 at 428 (1856) ("or any other material error. . . . any material error or errors . . . . and correcting other material errors. . . . "). The phrase was next used in 1875 in *Hall v. Weare*, 92 U.S. 728 at 731 (1875) ("Nor was there any material error in the admission of evidence"), and repeated several other times that decade. See, *Stewart v. Salamon*, 97 U.S. 361 at 364, (1878), *Grand Trunk Ry of Canaday v. Stevens*, 95 U.S. 655 at 659 (1877), and *The Stephen Morgan*, 94 U.S. 599 at 603 (1876). See n. 13 below.

the objection – a finding of facts upon which the judge shall render the verdict."

* * *

"The finding of facts is not trial by jury, any more than is listening to the arguments of counsel, or any more than is listening to the charge of the judge. The trial by jury is summed up in the verdict of the jury. Nothing is trial by jury except the verdict of the jury. That which precedes is only the process of trial, but the thing referred to in the Constitution of the United States is not the process or the progress of the trial; it is the verdict of the jury." Congressional Record – Senate 11775-11776, August 24, 1912, 62nd Congress, 2nd Session.[10]

The term "harmless error" may have first appeared in Congress's parlance through House Report 611, 62nd Congress, 2d Session, p. 2 (1912). See legislative history traced in fn. 11, *Kotteakos v. United States*, 328 U.S. 750, 759, 66 S.Ct. 1239, 1245 (1946).

Similar language was contained in House Report 913, 65th Congress, 3d Session, p. 2., and was repeated with similar referents in reports to congress in 1915 and 1916.[11] Each House Report cited *Railroad Company v. O'Reilly*, 158 U.S. 334 (1895), and *Cunningham v. Springer*, 204 U.S. 647 (1907) and stated:

"In other words, in the first of these cases the Supreme Court holds that an error is presumed to be prejudicial until the contrary appears, and in the second that an error is presumed to be harmless

[10] Senator Heyburn further remarked, "there seems to have grown up in this country, among some people and in some sections and under some interests, the fear of jury trial. I have heard men occupying judicial position speak lightly of jury trials. Perhaps in the vanity of their minds they felt that all matters affecting human kind should be vested in them for determination." Congressional Record – Senate 11777, August 24, 1912, 62nd Congress, 2nd Session.

[11] These include a report by Representative Webb, Chairperson of the House Judiciary Committee, House Report 1218, 63d Congress, 3d Session, (1915), extracts reprinted in House Report 264, 64th Congress, 1st Session (to Accompany H.R. 9428) February 26, 1916.

until the contrary is made to appear. It is the purpose of the first section of the present bill to enact . . . . that in the consideration in an appellate court . . . judgment shall be entered upon the merits without permitting reversals for technical defects in the procedure below and without presuming that any error which may appear had been of necessity prejudicial to the complaining party." House Report 264, pp. 2-3.[12]

This description of both decisions not only misdescribes both decisions, but also is quite incorrect in its reference to harmless error. No opinion by the Supreme Court employed the term "harmless error" in the "modern" sense until Justice VanDevanter's opinion in *Meeker v. Lehigh Valley Railroad Company*, 236 U.S. 434, at 439 (1915) although the term was frequently used in headnotes to Supreme Court decisions earlier.[13]

Congress reconsidered the "harmless error" language of the 1911 and 1912 bills in 1917 [See, Congressional Record –

[12] As a practical matter, this description of both holdings is inaccurate. In *Railroad Company v. O'Reilly* the court held certain hearsay evidence would not have alone caused a reversal since it was "immaterial" 158 U.S. 337, however, other improperly admitted evidence was "so serious as to compel a reversal" 158 U.S. 335-6. In *Cunningham v. Springer* the court was unable to conclude that any error existed, but on the assumption that certain testimony was error, considered it became "immaterial" 204 U.S. 655. Neither case articulated a presumption similar to those represented in the Congressional reports.

[13] Such as in relation to *Cunningham v. Springer*, 204 U.S. 647 (1907), and was mentioned by Justice Peckham for the Court while describing a state case, *Hale v. Allinson*, 188 U.S. 56, 61 (1903). During the 1870s several justices described certain errors as harmless: Mr. Justice Hunt in three cases: *Transportation Line v. Hope*, 95 U.S. 297, 303 (1877) ("If there was an error in this respect, it was quite harmless."); *Railroad Co. v. Pratt*, 89 U.S. 123, 135 (1874) ("The error was, however, harmless."); *Chambers County v. Clews*, 88 U.S. 317, 321 (1874) ("While we think there was error in the judgment upon this plea, it seems to have been a harmless one."); and Mr. Justice Strong in *Lucas v. Brooks*, 85 U.S. 436, 454 (1873) ("The error of the court, therefore, if there was an error, was perfectly harmless. . . . "). See also *Thaw v. Falls*, 136 U.S. 519, 547-48 (1890) ("harmless and inoperative error").

Senate, 11586 November 18, 1917, 65th Congress, 1st Session] and also in 1919. [Congressional Record – House, 3605 February 17, 1919, 66th Congress, 1st Session]. Each of these bills provided that judgments be affirmed as long as technical errors, defenses or exceptions do not affect the *substantial rights* of the parties.

The first federal "harmless error" law, Act of February 26, 1919, ch. 48, 40 Stat. 1181, stated:

> "All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defenses, or exceptions which do not affect the substantial rights of the parties." [Compare, Rule 61, Federal Rules of Civil Procedure, Harmless Error].

B. Examination of the Original Understanding of Harmless Error Both by Congress and by Federal Courts Suggests that the Harmless Error Concept was Quite Comparable to Material Error.

As suggested above, the references by the headnote writers to case reports for both federal and state courts, as well as the discussion on the floor of Congress, frequently occur in the context of the term material error. See supra footnotes 4, 9, 12 and accompanying text. Senator Heyburn explicitly stated the concepts were parallel and presented similar difficulties. The historical sense of material error or "affect the substantial rights of a party" does not appear to have been outcome dependent. The historical sense is more correctly stated as "impact." The first harmless error statute

spoke of affecting substantial rights, not of affecting or reversing the outcome.[14]

C. Concern with Improper Judicial Invasion of Jury Functions has a Venerable History as Bushell's Case Illustrates.

Concern with jury prerogatives is firmly embedded in the history of habeas corpus. *Bushell's Case*, 124 Eng. Rep. 1006, Vaughn, 135 (en banc, C.P. 1670) is an excellent illustration of the use of the writ to secure fundamental liberty and protect such prerogatives.[15] *Bushell's Case* involved the liberty of four jurors who acquitted William Penn, the founder of Pennsylvania, despite judicial direction to convict. Penn had been accused of unlawful assemblies and contempts (by preaching the gospel in Grace Church Street, although nobody testified as to what Penn had said). The case was likely well known to the lawyers who drafted the United States Constitution in Philadelphia.[16] Lord Chief Justice Hale described *Bushell's Case*:

> "But it was agreed by all the judges of England (and only one dissenting) that this fine was not legally set upon the jury, for they are judges of matters of fact; and although it was inserted in the fine that it was 'contra directionem curiae in materia legis,' this mended not the matter, for it was impossible any matter of law could come in question till the matter of fact were settled and stated, and agreed by

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[14] The sense of Mr. Justice Trible's use of the word harmless in *Ellott et al. v. Peirsol et al.*, 26 U.S. 328, at 337 (1828) is most analogous: "[I]t will appear that Mrs. Elliott's declarations could in no manner have influenced the verdict, and were therefore, harmless."

[15] Justice Cardozo described this case as "born of the fear of the Star Chamber." *Clark v. U.S.*, 289 U.S. 1, 17 (1933)

[16] *Commonwealth v. Contakos*, 453 A.2d 578, 580-82 (Pa. 1982) describes the facts surrounding *Bushell's Case*. *Bushell's Case* was cited to the United States Supreme Court in *Ex Parte Bollman*, 4 Cranch 75, 8 U.S. 75 (1807), and commented upon by Loard Chief Justice Hale whose comments were subsequently discussed by Blackstone, *Commentaries on the Laws of England*, vol 4. p. 361, vol 3 at 374-75.

the jury; and of such matter of fact they were the only competent judges. And although the witnesses might per chance, swear the fact, to the satisfaction of the court, yet the jury are judges, as well of the credibility of the witnesses, as of the truth of the fact, for possibly they might know somewhat, of their own knowledge, that what was sworn was untrue; and possibly they might know the witnesses to be such as they could not believe; and it is the conscience of the jury that must pronounce the prisoner guilty, or not guilty. And to say the truth, it were the most unhappy case, that could be, to the judge, if he, at his peril, must taken upon him the guilt or innocence of the prisoner; and if the judge's opinion must rule the matter of fact, the trial by jury would be useless." 22 Fed. Cas. 1322, 1329-30.[17]

Lord Mansfield paraphrased *Bushell's Case*:[18]

"The fundamental definition of trial by jury, depends upon a universal maximum that is without exception: 'Ad quaestionem juries non respondent juratores; ad questionem facti, non respondent judices,' literally taken is true: if it be demanded, 'what is the fact?' the judge cannot answer; if be asked, 'what is the law in the case' the jury cannot answer it."

Chief Justice Vaughn expressed two separate difficulties with the attempt to compel a jury verdict in *Bushell's Case*. The first difficulty relates to knowing facts; the second relates to what one concludes or infers from such facts.

i) Fact Determination

Chief Justice Vaughn identified nine problems with the judge taking over the function of fact determination traditionally

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[17] Chief Judge Cranch asserted, however, that *Blackstone*, "materially altered the language of the last clause of the last sentence. Blackstone says, '. . . . for if the judge's opinion must rule the verdict the trial by jury would be useless.' " *Stettinius v. U.S.*, 22 Fed. Cas. 1322, 1330 (Cir. Ct. D. C. 1839)

[18] While delivering the opinion in *Rex v. Shipley (Case of Dean of St. Asaph)*, 21 Howell State Trials 847, 1 Ersk. 211, 217 (K.B. 1784).

assigned to the jury. *Bushell's Case*, 124 Eng. Rep. 1012-13. They include:

> "But the evidence which the jury have of the fact is much other than that; for,
>
> 1. Being return'd of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in Court, but to this evidence the Judge is a stranger.
>
> 2. They may have evidence from their own personal knowledge, but which they may be assur'd, and sometimes are, that what is depos'd in Court, is absolutely false; but to this the Judge is a stranger, and he knows no more of the fact than he hath learn'd in Court, and perhaps by false depositions, and consequently knows nothing.
>
> 3. The jury may know the witnesses to be stigmatiz'd and infamous, which may be unknown to the parties, and consequently to the Court.
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> * * *
>
> 7. To what end is the jury to be retorn'd out of the vicinage, whence the cause of action ariseth? To what end must hundredors be of the jury, whom the law supposeth to have nearer knowledge of the fact than those of the vicinage in general? To what end are they challeng'd so scrupulously to the array and pole? To what end must they have such a certain free-hold, and be probi & legales homines, and not of affinity with the parties concern'd? To what end must they have in many cases the view, for their exacter information chiefly? To what end must they undergo the heavy punishment of the villanous judgment, if after all this they implicitly must give a verdict by the dictates and authority of another man, under pain of fines and imprisonment, when sworn to do it according to the best of their own knowledge:
>
> * * *

9. It is absurd a jury should be fined by the Judge for going against their evidence, when he who fineth knows not what it is, as where a jury find without evidence in Court of either side, so if the jury find, upon their own knowledge, as the course is if the defendant plead solvit ad diem, to a bond prov'd, and offers no proof. The jury is directed to find for the plaintiff, unless they know payment was made of their own knowledge, according to the plea.

And it is as absurd to fine a jury for finding against their evidence, when the Judge knows but part of it: for the better and greater part of the evidence may be wholly unknown to him; and this may happen in most cases, and often doth, as in *Graves and Shorts case.*"

While the nature of the jury has changed in detail over the last three centuries (C.J. Vaughn's point 1 above), many of these concerns remain valid today. Only the collective jury is likely to have sufficient knowledge of the vicinage against which it can test many witnesses' statements.

For example, in the instant case, a reviewing court is quite unable to fully appreciate Mr. Brecht's explanation that his flight in panic to his parents' house was by the most direct route, a route through a corner of the state of Minnesota. Even a local judge might not be sufficiently familiar with the traffic patterns of the area to evaluate such testimony. While such general community knowledge may be quite different from knowledge assumed to be within the earliest juries' ken,[19] such knowledge remains an important value in all trials.

Conversely, the ability of the Seventh Circuit to understand the complex and confusing testimony about the interrelationship of the rooms in the house where the shooting took place is doubtful, particularly since the record on appeal was devoid of any diagram of the house either outside or

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[19] Holdsworth states that during the latter part of the 17th century the jury lost their character as witnesses. Holdsworth, 1 History of English Law, pp. 316-19 (7th ed. Rev., 1956).

inside. (See Jt. App. 138-139) Scant ability exists based upon the cold record to appreciate arguments revolving around the period during which Mr. Hartmann disappeared after being shot. (See Jt. App. 141, re phone off hook)

ii) Inferences From Facts.

Chief Justice Vaughn was, however, also concerned about inferences from raw facts. He stated:

"I would know whether any thing be more common, than for two men students, barristers, or Judges, to deduce contrary and opposite conclusions out of the same case in law? And is there any difference that two men should inferr distinct conclusions from the same testimony: Is any thing more known than that the same author, and place in that author, if forcibly urg'd to maintain contrary conclusions, and the decision hard, which is in the right? Is any thing more frequent in the controversies of religion, than to press the same text for opposite tenents? How then comes it to pass that two persons may not apprehend with reason and honesty, what a witness, or many, say, to prove in the understanding of one plainly one thing, but in the apprehension of the other, clearly the contrary thing: must therefore one of these merit fine and imprisonment, because he doth that which he cannot otherwise do, preserving his oath and integrity? And this often is the case of the Judge and jury." 124 Eng. Rep. 1009.

Chief Justice Vaughn was speaking of the judge and jury, both of whom, at least had seen and heard the witnesses in open court. He believed they could differ in conclusion. In the case at bar no reviewing court, state or federal, has had such an opportunity, and thus there is even more opportunity for difference in appreciation of the testimony and inferences from testimony in this case.

Chief Justice Vaughn further wrote:

"A man cannot see by anothers eye, nor hear by anothers ear, no more can a man conclude or inferr the thing to be resolv'd by anothers understanding

> or reasoning; and though the verdict be right the jury give, yet they being not assur'd it is so from their own understanding, are forsworn, at least in foro conscientiae." *Bushell's Case* 124 Eng. Rep. at 1013.

To invade the province of the jury is virtually to abolish the jury system. As Chief Justice Vaughn stated:

> "For if the Judge, from the evidence, shall by his own judgment first resolve upon any tryal what the fact is, and so knowing the fact, shall then resolve what the law is, and order the jury penally to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue tryals by them at all?
>
> But if the jury be not oblig'd in all tryals to follow such directions, if given, but only in some sort of tryals (as for instance, in tryals for criminal matters upon indictments or appeals) why then the consequence will be, though not in all, yet in criminal tryals, the jury (as of no material use) ought to be either omitted or abolished, which were the greater mischief to the people, than to abolish them in civil tryals." *Bushell's Case*, 124 Eng. Rep. 1010

The impact on the jury of nonharmless error can only be determined by speculation that directly invades the province of the jury.

II. CONGRESSIONAL CONSIDERATION OF HABEAS CORPUS SINCE CHAPMAN V. CALIFORNIA

Since the decision in *Chapman v. California,* Congress has considered changing the standard of review in habeas of state convictions under section 2254 a number of times. Thus the argument in part III C of the Seventh Circuit's opinion is not well taken. Jt. App. at 123. However, Congress has not enacted legislation to change the *Chapman* standard reflecting a congressional consensus *Chapman* is appropriate. Indeed, all legislative attempts of the last quarter of a century to limit the "harmless error standard" or curtail federal review under 28 U.S.C. section 2254 have failed.

A. The 1968 Attempt to Curtail Habeas Jurisdiction in Miranda Cases

In 1968, the year following *Chapman,* while speaking in opposition to Title II of the Omnibus Crime Control and Safe Streets Act of 1968, S. 917, Senator Tydings delivered a lengthy eulogy to the importance of the writ of habeas corpus in Anglo-American jurisprudence.[20] Senator Tydings attacked proposed language that would "abolish habeas corpus review in any Federal court of a State criminal conviction." He described, "This aspect of Title II [as] . . . an affront to both our Constitution and our history. This provision is clearly unconstitutional. It is nothing short of a blatant suspension of the writ of habeas corpus, against the clear command of the Constitution."[21]

That attempt to curtail federal habeas corpus jurisdiction failed.

B. The 1972 & 1973 Attempts to Modify Habeas by Requiring Proof of Substantial Deprivation and Demonstration of Probable Different Result

In 1972, another effort was made to alter the harmless error standard. In connection with the proposals, Richard G. Kleindienst, Attorney General of the United States, wrote the House Judiciary Committee generally supporting H.R. 13722, a proposal to modify the harmless error standard of *Chapman v. California,* Congressional Record – Senate, 24939 (July 24, 1972), 92nd Congress, 2nd Session. This proposal (contained

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[20] See inter alia Congressional Record – Senate 12827-12836, May 10, 1968, and Congressional Record – Senate 13990 – 14003, May 20, 1968, 90th Congress, 2nd Session.

[21] Congressional Record Senate, 12829, May 10, 1968, 90th Congress, 2nd Session. The language contained in S.Rep. 90-1097, Section 702(a) (proposed Section 2256, *Procedures in Obtaining Writs of Habeas Corpus*). Section 2256 would have defacto eliminated federal court habeas corpus jurisdiction over State convictions. (Section 2256 of committee print, Title II, Section 702(a), of the Omnibus Crime Control and Safe Streets Act of 1967, S.Rep. 90-1097, p. 10, (1968))

in S. 3833, text at Congressional Record Senate 22936) would have required proof of a "substantial deprivation" of constitutional rights and required the petitioner to show that a "different result would probably have obtained if such constitutional violation had not occurred." (at 24939) However, Attorney General Kleindienst supported removal from the bill of language that would have required "substantial doubt of the guilt of the applicant" because such consideration would introduce into habeas corpus a concept which should not be a focus of inquiry. (*Id.*) He wrote, "The basic fairness of the procedures used to convict the defendant without reference to his guilt or innocence, should remain the primary focus of Federal habeas corpus." (*Id.*)[22]

The proposed changes to Federal habeas corpus were not enacted.

C. The 1976 and 1977 Attempts to Overturn *Stone v. Powell*

In 1976 and 1977 attempts were made to overturn the holdings of *Stone v. Powell*, 428 U.S. 465 (1976) and *Francis v. Henderson*, 425 U.S. 536 (1976). See, Congressional Record – Senate, 11338, April 20, 1977, 95th Congress, 1st Session. Senator Nelson spoke at length against the proposal.[23] The proposed legislation once again failed.

D. The 1983 and 1984 Attempts to Curtail Habeas Corpus

In 1983, Senator Thurmond supported a proposed bill entitled "Finality of Criminal Judgments Act" that would have amended 2254 by adding a new subsection:

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[22] That legislative effort continued in the next Congress. See Congressional Record – Senate 2220, January 26, 1973, 93rd Congress, 1st Session. Attorney General Kleindienst in a letter to the House Judiciary Committee explicitly described the draft legislation as a modification of the harmless error standard of *Chapman v. California*, Congressional Record – Senate, 2225, January 26, 1973, 93rd. Congress, 1st Session.

[23] See also statement by Senator Mathias (at 11343), the Congressional Research Service (at 11344), and a student authored piece (at 11348).

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings." Congressional Record, S 402, January 27, 1983, 98th Congress, 1st Session.

Accompanying Senator Thurmond's remarks was an article by Jim Smith, then Attorney General of the State of Florida (S 403-407). Nowhere was the harmless error standard itself criticized by either Jim Smith or Senator Thurmond.

Mr. Smith stated, "*Congress* is the appropriate body to define the limits of federal habeas corpus review of state court judgments." S. 406.

The proposed legislation was again not adopted.

Senator Thurmond supported similar legislation in 1984. This proposal contained language described as preserving the state conviction unless the federal court found "a significant error or deficiency in the State proceedings. A mere reasonable difference of opinion in a case in which the proper disposition is unclear should not be grounds for disturbing a State judgment in a habeas corpus proceeding." Congressional Record, S. 979, Feb. 6, 1984, 98th Congress, 2nd Session.[24]

The proposal drew substantial opposition, including that of Senator Levin, who stated:

> "If a court declares that a State court was reasonable but was wrong, we are going to find people being executed although their constitutional rights were violated. I hope my friend from Florida is right – I think he very well may be – that the Federal courts are going to work that word 'reasonable,' the way they now work the habeas corpus process. I hope he is right. I know he hopes he is

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[24] This proposal was supported by a letter from Robert McConnell, Assistant Attorney General, at Congressional Record – Senate, S. 988, Feb. 6, 1984, 98th Congress 2nd Session. See also Congressional Record, H 11685, 11740-41, Nov. 26, 1991, 102nd Congress, 1st Session., and Conference Report, Violent Crime Control and Law Enforcement Act of 1991, HR 102-405, 102nd Congress, 2nd Session.

> [not] (sic?) wrong on this but I hope he is right. I think my fears will turn out to be very well justified.
>
> I hope we do not pass this bill, because I do not think we should be writing laws that are that vague that affect constitutional rights. . . . " Congressional Record, S. 991, February 6, 1984, 98th Congress, 2nd Session.

Senator Levin argued that between 1976 and 1984, three quarters of the capital cases decided by Federal Courts of Appeals *on the merits* were decided in favor of death sentenced individuals. "These very compelling statistics show the critical importance of habeas corpus being available in Federal courts to correct errors in capital cases committed in State courts." Congressional Record, S. 991, Feb. 6, 1984, 98th Congress, 2nd Session.

Once again, the legislation did not pass.

E. Attempts in 1991 and 1992 to Overturn *Arizona v. Fulminante*

The next major consideration by Congress of the standard of review in habeas corpus cases occurred in 1991-92 in the context of a proposal to overturn this court's decision in *Arizona v. Fulminante*, ___ U.S. ___, 113 L.Ed. 2d 302 (1991). The proposal regarding "Coerced Confessions" reads:

> "The admission into evidence of a coerced confession shall not be considered harmless error. For the purposes of this section, a confession is coerced if it is elicited in violation of the fifth or fourteenth articles of amendment to the Constitution of the United States." Congressional Record, H. 7923, Oct. 16, 1991, 102nd Congress, 1st Session.

This legislative attempt to reverse *Arizona v. Fulminante* drew a threatened veto by President Bush, as well as the opposition of 32 state Attorneys' Generals and other law enforcement officers. Congressional Record, H. 11679, November 26, 1991, 102nd Congress, 1st Session.

What is most impressive during all discussion of the attempt to overturn this court's *Arizona v. Fulminante* decision, is the apparent universal acceptance of the harmless

error standard as an assumed basis for argument, and the lack of criticism of that standard. For example a letter from the U.S. Attorney, District of Arizona, Ms. Linda A. Akers, accepted the propriety of "normal harmless error standards" as did Representative Jon Kyle who cited the letter while he spoke against reversing *Arizona v. Fulminante*. Congressional Record, H. 7902, October 16, 1991 102nd Congress, 1st Session. Both Ms. Akers and Representatives Kyle find that, "There is no rational reason why a different rule [from harmless error] should apply to claims relating to involuntary statements by the defendant." *Id.*

Similarly, Representative Schiff spoke in opposition:

> "The U.S. Supreme Court recently ruled that if a statement by a defendant was admitted in error, that the same rule of law would apply to that error as applies to all other errors; that is, a review would be made to determine whether a new trial had to be ordered or whether evidence was so overwhelming of guilt that there was no reason to order a new trial. *That is the same standard as every other error that I know of.* Now, the point is that the bill sets another standard. The bill chooses a different standard for a new trial than has been determined by the U.S. Supreme Court. "Congressional Record, H 7889, October 16, 1991, 102nd Congress, 1st Session.[25]

The Joint Conference Committee subsequently adopted the proposal to overturn *Arizona v. Fulminate*.[26]

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[25] Emphasis added. Representative Schiff wanted a separate vote on the *Arizona v. Fulminate* issue.

[26] The National District Attorneys Association opposed. See for example speeches in opposition by Representative Hyde, Congressional Record, H 11745, Nov. 26, 1991, 102nd Congress, 1st Session, and Senator Thurmond, Congressional Record, S 18670, November 27, 1991, 102nd Congress, 1st Session. Senator Grassley also opposed the conference report: "The conference report will exclude so-called coerced confessions even if the error is harmless beyond a reasonable doubt to the issue of guilt." Congressional Record, S 18683, Nov. 27, 1991, 102nd Congress, 1st Session. Similarly, Senator Simpson opposed the conference report: "It's harmless error to allow a jury to hear a so-called coerced confession if there is overwhelming additional evidence of guilt." Congressional Record, S 18684, Nov. 27, 1991, 102nd Congress, 1st Session.

The stated rationale was:

"In a consistent line of cases beginning decades ago, the Supreme Court maintained the longstanding proposition that the admission of a coerced confession shall never be a harmless error. See, e.g., *Rose v. Clark*, 478 U.S. 570 (1986); *Chapman v. California*, 386 U.S. 18 (1967); *Haynes v. Washington*, 373 U.S. 503 (1963); *Payne v. Arkansas*, 356 U.S. 560 (1958); *Lyons v. Oklahoma*, 322 U.S. 596 (1944).

In *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court held that the harmless error rule can be applied to certain constitutional violations. At the same time, however, the Supreme Court recognized that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* At that time the Supreme Court recognized only three of these fundamental constitutional errors: denial of the right to counsel, an unbiased judge, and the admission of a coerced confession.

Since Chapman, the Supreme Court has found several additional constitutional violations which are not subject to harmless error analysis. In *Fulminante*, however, the Supreme Court reversed this longstanding principle and, for the first time, applied harmless error analysis to the admission of a coerced confession.

. . . .

The Committee believes that principles of stare decisis, deterrence of police misconduct and fundamental fairness require return to the appropriate rule in effect prior to *Fulminante*. The Committee believe that the admission of a coerced confession, perhaps the most damaging and most inculpatory evidence available to the prosecution, is such a fundamental error that it would be impossible to say that the jury ignored the confession and convicted the defendant on other evidence." Report of the Judiciary Committee of the House of Representatives on H.R. 3371, Rept. 102-242, 102nd Congress, 1st Sess. (pp. 109-110).

Senator Cranston opposed an earlier version of the Omnibus Crime Control Act of 1991 and in particular various provisions for altering habeas to increase the likelihood of actual imposition of the death penalty. He stated, "By adopting these habeas reforms, the proponents have regulated constitutional errors to the realm of mere technicalities, despite the irrevocable nature of such errors. When lives are at stake, Mr. President, how can a constitutional error be a harmless error?. . . . I am guided in my opposition by the belief that constitutional errors are never mere technicalities and that the great writ of habeas corpus is at the cornerstone of our democracy." Congressional Record S 9820, July 11, 1991, 102nd Congress, 1st Session.

The bill did not become law but was reconsidered in 1992.

Representative Newt Gingrich, in extension of his 1992 remarks opposed the conference report's overturning of *Arizona v. Fulminante* stating:

> "Overturning of convictions on the basis of harmless error. Title IV of the conference bill automatically requires reversal of convictions on appeal where the trial court erroneously admitted incriminating statements by the defendant, even if the independent evidence of guilt is overwhelming and it appears beyond a reasonable doubt that the error could not have affected the outcome of the trial." Congressional Record, E 487, March 2, 1992, 102nd Congress, 2nd Session.

Representative Gingrich thus appears to have accepted *Chapman*.

Senator Simpson also opposed the bill as a:

> "[P]rocriminal rights bill hidden behind a huge pile of money – facade" criticizing once again the conference committee proposal which "overrules the harmless error rules that have been applied by the Supreme Court over a number of years. . . . Convicted criminals will be able to use the expanded habeas review process to argue for reversals of sentences and, under the harmless error changes to argue for new trials." Congressional Record, S 2662, March 3, 1992, 102nd Congress, 2nd Session.

Senator Thurmond also spoke against the conference report in language similar to his 1991 arguments:

> "Unbelievably, the partisan report also contains a broad provision which mandates automatic reversal of criminal convictions based on improper admission of a defendant's statement or confession at trial. This new rule applies even in cases where it is shown beyond a reasonable doubt that the error was harmless and could not have affected the outcome of the case. It overturns the Supreme Court case of Arizona versus Fulminante which *correctly* allows the harmless error rule to apply to confessions by criminals." Congressional Record S 2680, March 3, 1992, 102nd Congress, 2nd Session (emphasis added).[27]

Senator Biden viewed the proposal as reflecting the traditional rule barring the use of coerced confessions at trials:

> "[Y]ou can argue the definition of what constitutes a coerced confession and whether it should be allowed under certain circumstances – that is, whether the confession is coerced – but it would allow, if you adopt [the opponents language] someone to take a rubber hose, as I read it, and beat a confession out of somebody. God bless America. They did that during the Inquisition in the 15th

[27] Senator Thurmond listed 70 anticrime measures not contained in the Crime Control Act of 1992 [CCA], one of which is, "preservation of harmless error doctrine. The CCA . . . does not weaken in any manner the existing doctrine that trial error is not grounds for reversing a criminal conviction if the court of appeals determines that it was harmless beyond a reasonable doubt. . . . " Congressional Record, S 2838, March 4, 1992, 102nd Congress, 2nd Session. See also remarks by Senator Thurmond, Congressional Record, S 2821, March 4, 1992, 102nd Congress, 2d Session and Congressional Record, S 3933, March 19, 1992, 102nd Congress, 2d Session; by Senator Gramm, Congressional Record, S 6699, May 14, 1992, 102nd Congress, 2nd Session; and by Senator Hatch, Congressional Record, S 2827, March 4, 1992, 102nd Congress, 2d Session. See also remarks of Justice John Paul Stevens on the bicentennial of The Bill of Rights, remarks introduced by Senator Simon to the Congressional Record, S 3140, March 10, 1992, 102nd Congress, 2d Session. See, also letter by the President of the Fraternal Order of Police, Congressional Record, E 507, March 3, 1992, 102nd Congress, 2d Session.

> century. They did that in England before our Founding Fathers. . . . The Fulminate case says a coerced confession can be found to be harmless error. And the gravamen of that is that as long as there were other ways they would have been able to convict the person and they have that other evidence, they do not throw the case out merely because they may, in the first instance have coerced a confession. Whoa, Mr. President: whoa, . . . This is where somebody coerces a confession. That can mean anything from a rubber hose to saying: I will lock you up in jail forever: no one knows you are here. You cannot call your lawyer . . . We use the basic, old traditional rules. I do not call that a technicality." Congressional Record S 2831-32, March 4, 1992, 102nd Congress, 2d Session.[28]

F. Legislative History: Conclusion

In short, examination of Congressional history since *Chapman* shows several clear instances of Congressional rejection of attempts to curtail the harmless error standard. However, those attempts all failed, because of Congressional resistance by those favoring the maintenance of the vitality of habeas corpus to test State convictions. More recently attempts have been made to reverse the courts decisions perceived as "lowering" the weight of certain categories of errors to "mere harmless error" review. These also have not passed, but floor debate and other materials cited above evidence Congressional acceptance of the harmless error test. Such acceptance spans the political spectrum in attitudes towards the procedural protections for the accused embodied in the Bill of Rights. "Harmless Error" is an accepted baseline for Congressional disputation.

[28] Congressional committee reports of the 1990s reflect general acceptance of the concept of "harmless error" as an appropriate standard. See, House Report on the Comprehensive Crime Control Act of 1990, Rept 101-681, 101st Congress, 2nd Sess., at 132, "To demonstrate 'prejudice,' a petitioner need not establish that the underlying claim, if reached, is meritorious, but only that the alleged error, if proven, is not *harmless*." (emphasis added)

The Seventh Circuit's decision in the instant case enacts by judicial fiat a variant of legislative changes which Congress has been unable to agree upon, but which Congress has in various forms, rejected over the last quarter century. *Chapman v. California* has been ratified by the passage of time. Any change so dramatic as that adopted by the United States Court of Appeals for the Seventh Circuit, should be made by Congress, not by judicial fiat.

III. PSYCHOLOGICAL RESEARCH SUPPORTS THE CONCERNS OF BUSHELL'S CASE

In the last several decades psychologists have explored the means by which people made decisions. Much of this research has focussed upon jury decisionmaking. Such research directly relates to the central question in the case at bar: To what degree can a court in hindsight, determine the impact of non-harmless error upon the jury verdict?

A. Heuristics

Many decisions are based on beliefs concerning the likelihood of uncertain events such as the outcome of an election, or a defendant's guilt. The factors that go into making a judgment about any of such events are often quite numerous. Individuals use simplifying procedures or strategies to structure their decision process. Psychologists call these strategies "heuristics."[29] For example, if asked to predict how someone would do in a particular job, it is unlikely that each item on a resume will be separately and individually considered. Instead, one is likely to use a simpler procedure, such as considering how similar the applicant is to people who had already succeeded in the job in question. Hogarth, *Judgment and Choice: The psychology of decision*, 5 (1987). Such

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[29] See, Tversky and Kahneman, "Availability: A heuristic for judging frequency and probability," 5 Cognitive Psychology, 207 (1974) Slovic, Fischoff, and Lichtenstein, "Behavioral decision theory," 28 Annual Review of Psychology, 1-39 passim (1977), Hogarth, *Judgment and Choice: The psychology of decision.* (1987), Dawes, *Rational Choice in an uncertain world* (1988)

simplifying strategies are useful, but sometimes lead to severe and systematic errors in judgment.

Research has identified several judgmental heuristics that are directly applicable to the role of a court reviewing the impact of constitutional error upon a jury verdict.

Among the most commonly identified and agreed upon heuristics are: 1) representativeness; 2) availability; and, 3) anchoring and adjustment.

1) *representativeness*: The representativeness heuristic refers to judgments based upon certain things which are presumed to properly "represent" likely future performance or results. For example, one may buy an automobile on the basis of a five minute test drive, or elect a politician on the basis of her ability to campaign. The implicit assumption is that what we see under one set of circumstances is representative of what our experience will be under another, often much wider, set of circumstances. *See,* Rachlin, *Judgment, Decision and Choice,* 59 (1989).

2) *availability*: The availability heuristic involves estimates of frequency or probability by the ease with which instances or associations can be brought to mind. *See,* Kahneman, D. and Tversky, A., "Availability: A heuristic for judging frequency and probability," 5 *Cognitive Psychology,* 207, 208 (1973). For example, people often believe traffic accidents are more likely immediately after they have observed one.

3) *anchoring and adjustment*: "Anchoring and adjustment" is another commonly used heuristic, one highly dependent upon information presented or available to a person. See, Tversky & Kahneman, "Judgment under uncertainty, Heuristics and biases," 185 *Science* 1124 (1974). Predictions are made by reference to available cues. Adjustments are then made. For example, a manager asked to forecast next year's company sales would probably take this year's sales as a starting point, or anchor, and then make adjustments according to anticipated market changes. The dangers of the anchoring and adjustment strategy lie mainly in the way the original anchor is generated. See, Hogarth, *Judgment and Choice: The psychology of decision,* 54 (1987).

Research suggests a court attempting to evaluate the impact of error upon a jury will encounter difficulty with each of these common heuristics. Thus a criminal court judge has a very different set of experiences from the jury upon which to base her "representative heuristic" so as to judge the guilt of today's accused. That judge may have "test driven" many murder or rape trials.

Similarly, a criminal court judge may call to mind as most "available" many instances in which she saw juries reject claims of self defense, while evaluating a self defense or accident claim.

Likewise, a trial or appellate court, after the return of a jury verdict of guilty, is hard put not to use an "anchor and adjust" strategy to determine the impact of error upon the jury decision. Certainly such judicial exercise, is quite different from any exercise the original jury went through.

B. Hindsight Bias and Outcome Bias

Considerable study has also been done of two types of biases, hindsight and outcome biases.[30]

Hindsight bias has been called the,

> " 'Monday morning quarterback' effect, the 'knew it all along' effect, 'creeping determinism,' and 'the curse of knowledge.' Studies of the psychology of hindsight have shown that decision makers tend to underestimate the impact of discovering the outcome of an uncertain event or the truth of an assertion on their perceptions of history. As a result, decision makers exaggerate the degree to which they would have foreseen the 'inevitability' of an outcome. Hindsight bias has been found in a variety of contexts, . . . and even with experienced professionals." Schkade, D.A. and Kilbourne, L.M., "Expectation – Outcome Consistency and Hindsight Bias," 49 *Organizational Behavior and Human Decision Processes,* 105, 106 (1991) (citations omitted).

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[30] These biases may be individual applications of the general heuristics identified above. The anchoring and adjust heuristic may best describe these biases, although selective recall may also be involved. See Schkade, D.A. and Kilbourne, L.M., Expectation-Outcome Consistency and Hindsight Bias, 49 *Organizational Behavior and Human Decision Processes,* 105, 109 (1991).

Hindsight bias has been frequently demonstrated in the jury context.[31]

In a detailed review of most recent hindsight bias empirical research, Hawkins and Hastie caution:

> "In legal decision making, several procedures are justified by the assumption that a judge or juror can undo the effects of extralegal testimony or illegitimate information. Again, research and theory on hindsight phenomena suggest that the decision maker is unlikely to even be aware of the influence of the to-be-disregarded information, much less able to undo its effects. We also found many examples of historical, political, and financial forecasting in which hindsight biases are likely to be involved." Hawkins, S.A. and Hastie, R., "Hindsight: Biased Judgments of Past Events After the Outcomes Are Known," 107 *Psychological Bulletin,* 311, 323 (1990) (For some specific legal judgments examined see *Id.* at 318-19).

"The consistent finding has been that such information appears to have a biasing effect at both the individual and the group level." Casper et al. "Juror Decision Making, Attitudes, and the Hindsight Bias," 13 *Law and Human Behavior,* 291, 308 (1989).

The same inability to ignore has frequently been found. The exact process by which jurors behave is unclear, but Casper et. al suggest: "The hindsight bias offers [an explanation]. . . . It suggests a somewhat different process [from a process of juror reactance against judicial attempts to reduce

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[31] Bodenhausen found clear evidence that hindsight bias produced lower estimates of the likelihood of innocence as contrasted to estimates with no-outcome information and not-guilty outcome information. Bodenhausen, G.V., "Second-Guessing the Jury: Stereotypic and Hindsight Biases in Perceptions of Court Cases," 20 *Journal of Applied Social Psychology,* 1112, 1117 (1990) (subjects 120 psychology students). Casper in a different study concluded that hindsight bias was at work. Casper, J.D., et al, "Juror Decision Making, Attitudes, and the Hindsight Bias," 13 *Law and Human Behavior,* 291, 306 (1989) (subjects 283 psychology students and 253 adults called for jury duty). So did Wasserman, et al., "Hindsight and Causality," 17 *Personality and Social Psychology Bulletin* 30, 33 (1991) (subjects 278 psychology students).

their freedom], one in which the information is integrated into interpretation and recall of testimony in a way that makes it difficult for jurors to ignore information even when they conscientiously try to do so." (*Id.* at 309) Jury interpretation and recall of evidence are both impacted by material they are cautioned not to use. Jury decisionmaking is impacted despite best efforts to obey instructions.

Outcome bias may be a particular variety of hindsight bias, or reflect preferences for or against certain outcomes. Outcome bias may exist when a person is told of the actual outcome of an event, then asked to evaluate the likelihood that such an event will occur on the assumption the outcome is unknown. Baron, J., and Hershey, J.C., "Outcome Bias in Decision Evaluation," 54 *Journal of Personality and Social Psychology* 569, 578 (1988) performed a series of experiments with undergraduate students and consistently found outcome bias demonstrated. This result replicates Fischhoff's who reported, "Finding out that an outcome has occurred increases its perceived likelihood. Judges are, however, unaware of the effect that outcome knowledge has on their perceptions. Thus, judges tend to believe that this relative inevitability was largely apparent in foresight, without the benefit of knowing what happened." Fischhoff, B., "Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty," 1 *Journal of Experimental Psychology: Human Perception and Performance,* 288, 297 (1975).

However, outcome bias studies also examine the impact of preferences for certain outcomes in predicting likely outcomes.

Baron and Hershey suggest:

> "The main practical implication concerns those many cases in which people judge the decisions of others after knowing their outcomes, as occurs in law, regulation, politics, institutions, and everyday life. Our results suggest that people may confuse their evaluations of decisions with the evaluations of the consequences themselves. Mere understanding that such confusion contaminates these evaluations is not enough to eliminate it." Baron, et al., *supra,* 54 *Journal of Personality and Social Psychology,* 569, 578 (1988).

In other words, the attempt by judges after the fact to place themselves in a before the fact position is quite dubious an exercise, an attempt to eliminate facts and biases that empirical research suggests is beyond the ability of most human beings.

C. Confirmation Bias

Another subject of experimental exploration and documentation has been "confirmation bias." The stereotype is an example of confirmation bias. "There is nothing so obdurate to education or to criticism as the stereotype. It stamps itself upon the evidence in the very act of securing the evidence." Lippman, Walter, *Public Opinion,* (Collier-McMillan Canada, Ltd., Toronto, Ontario) p. 65 (1922). Confirmation bias is an example of belief perseveration, the concept that once beliefs are formed and justified, it may take more compelling evidence to change them than it did to create them. Our beliefs influence the manner in which we seek out, interpret and store relevant information. When evidence is processed in the light of these prior beliefs, there is a tendency to perceive more support for those beliefs than actually exists in the evidence in question. The pervasiveness of beliefs in the decision making process has been termed "confirmation bias."[32]

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[32] A judge can unknowingly seek out evidence that supports his position and discredit or ignore evidence that does not. Of course the jury can do the same thing, and repeated studies suggest that juries do just that. "Confirmation bias has long been noted by philosophers of science." Kahneman, Tversky, & Slovic, *Decision Under Uncertainty: Heuristics and Biases,* 149 (1982). Such bias has been identified and documented in various experimental studies. See, Rothbart, M. et al. "Recall for Confirming Events: Memory Processes and the Maintenance of Social Stereotypes," 15 *Journal of Experimental Social Psychology,* 343 (1979) (subjects 164 undergraduate students.); and Bodenhausen, G.V., "Second-Guessing the Jury: Stereotypic and Hindsight Biases in Perceptions of Court Cases," 20 *Journal of Applied Social Psychology,* 1112, 1113-14 (1990) (subjects 120 undergraduate psychology students.) Rothbart et al. conclude the "subjects superior recall of expectancy-confirming events may account for the self perpetuating

(Continued on following page)

However, there is no reason to believe that the beliefs of judges mirror those of the jury. Inevitably, the judge will view evidence in manners different from that of individual jury members.

The stereotype of "homosexuality" may mean something quite different to trial and/or appellate judges, than it does to the jury members. Again as Walter Lippman observed:

> That is why the accounts of returning travellers are often an interesting tale of what the traveller carried abroad with him on his trip. If he carried chiefly his appetite, a zeal for tiled bathrooms, a conviction that the Pullman car is the acme of human comfort, and a belief that it is proper to tip waiters, taxicab drivers and barbers, but under no circumstances station agents and ushers, then his odyssey will be replete with good meals and bad meals, bathing adventures, compartment-train escapades, and voracious demands for money." Lippman, Walter, *Public Opinion, supra* 65 (1922).

For reviewing judges to believe that their scrutiny of a cold record represents any realistic ability to replicate what a jury would do absent material reflecting constitutional error, may itself be little more than confirmation bias reflecting firm belief in the superior intellect of members of the judiciary.

Judges are subject to such bias while making judgments about the quanta and quality of evidence contained in a trial record.

> "[S]uch biased searching, recollection, and assimilation not only bolster one's initial belief, they also produce a pattern of biased evidence that remains highly available to sustain the belief in question when its *initial* basis is attacked or even destroyed. The critical assumption here is that people do not

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character of social stereotypes, and that memory effects were not due solely to the selective retrieval of behavioral events." Rothbart, M., *supra* at 343. Bodenhausen states: "Thus, in criminal cases involving stereotyped offenders, preconceptions about the defendant's social group may color perceptions of his or her culpability *if* they are relevant to the crime in question." Bodenhausen, G.V., *supra* at 1114.

> constantly update or reevaluate the evidence relevant to their beliefs. They do not commonly decide "now that my prior hypotheses has been undermined somewhat I must go back and reassess all of the evidence that I ever considered in the light of that hypotheses." Kahneman, D., et al, *Decision Under Uncertainty, supra,* at 150.[33]

D. The Impact of Such Heuristics on Decision Making

A reviewing court scrutinizes a jury decision after the verdict has been rendered. The jury verdict is known, but hard to ignore. Hindsight bias and outcome bias presumably will have some impact upon any judgment the court makes about the likelihood of impact of evidence[34] and statements whose admission reflect constitutional error.

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[33] Psychologists have begun examining a descriptive model of human decision making called the "story model." That model posits that jurors decide by considering various stories that may describe the events underlying the evidence they have heard. Then, somewhat analogous to "best fit calculations" seeking a differential equation that best describes observed events such as the fall of an object from a skyscraper, jury members decide which story best fits their evaluation of the evidence. See Pennington, N., and Hastie, R., "Explaining the Evidence: Tests of the Story Model for Juror Decision Making," 62 *Journal of Personality and Social Psychology,* 189 (1992) (Experimental subjects 414 undergraduates.); Pennington, N., and Hastie, R., "Evidence Evaluation in Complex Decision Making," 51 *Journal of Personality and Social Psychology,* 242 (1986) (Subjects 26 adult members of a jury pool from Massachusetts). The story model provides a "conceptual model for what jurors are actually doing when asked to decide on a verdict for criminal cases." See, Pennington & Hastie at 253. The story model appears very promising. However, psychology is far from predicting the particular story that will be chosen as the best fit by a particular juror or jury.

[34] One study of the decisions by jurors in real cases concluded that 34 percent of the variance in individual jurors' judgments could be explained by the impact of evidence. Visher, C.A., "Juror Decision Making – The importance of Evidence," 11 *Law and Human Behavior* 1, 11-12 (1987), other factors explained an additional 10 percent of the variance, *Id.*, at 12. (These factors include juror's defendants' and victims' characteristics), leaving 56 percent of the variance unexplained. Visher's results are not atypical. See Casper, J.D., et al., "Juror Decision Making, Attitudes and the Hindsight Bias," 13 *Law and Human Behavior,* 291, 305 and passim (1989).

Moreover, the court will scrutinize the record with its own set of beliefs, reviewing all evidence subject to potential "confirmation" bias.

IV. THIS COURT SHOULD CONTINUE THE TRADITIONAL CHAPMAN STANDARD ON HABEAS REVIEW OF STATE CONVICTIONS

A. The Complex Kotteakos Standard comports with Psychological Research

This court stated in *Kotteakos v. United States,* 328 U.S. 750, 760 (1948), that the harmless error rule of then section 269 of the Judicial Code, 28 U.S.C.A. Section 391, addressed technical errors that "do not really hurt the party whose rights in the trial and in its outcome the technicality affects." If the error is technical the burden was upon the party seeking a new trial to prove its impact. However, "If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims under it." *Kotteakos,* 328 U.S. at 760 (citations omitted). This court went on to state, "[I]t is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. . . . These judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error." *Id.* at 763-4 (citations omitted)

The reviewing court must consider:

> "[T]he question . . . not were they [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.
>
> This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge other's reactions not by his own, but with

> allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.
>
> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. the inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 764-65. (citations omitted)

Although *Kotteakos* neither employed terms such as heuristics, nor hindsight bias, the opinion reflected understanding of the complex nature of the exercise at hand. The court reversed and remanded.

The opinion of the United States Court of Appeals for the Seventh Circuit cites as reasons for adopting a narrow standard of review in habeas attack problems of delay, accuracy and cost. (Seventh Circuit Opinion, Jt. App. 120-22) However, *Kotteakos* asserted, as has frequently been asserted, "But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth." *Kotteakos,* 328 U.S. at 773.

B. The Antiquity of the Writ of Habeas Corpus is Matched by its Importance as an Immediate Remedy to Try the Ability to Detain a Person[35]

Chief Justice Marshall considered in *Ex parte Bollman and Swartwout*, 8 U.S. 75 (1807) whether the writ of habeas corpus properly lay against judicial commitment. Chief Justice Marshall's response finding the writ proper against judicial commitment was short and direct, "Against this objection the argument from the bar has been so conclusive that nothing can be added to it." *Id.* at 100.

That argument for Bollman by Robert Goodloe Harper,[36] about inferior federal courts is just as applicable to state courts:

> "Before such a principle is admitted, let us inquire into its possible and even probable effects on the liberties of the people. Is it not manifest that it would deprive the citizens of the guardianship of the most respectable and independent courts, and place their personal liberty at the mercy of inferior tribunals? Do we not know that Congress may institute as many inferior tribunals, and may assign to the judges of these tribunals such salaries as they may think fit? Does it not hence result that a succession of courts may be instituted, to the lowest of which may be assigned salaries so contemptible and duties so unimportant or so odious, as necessarily

[35] For example, the statute of 31 Car. 2, c. 2, 27 May 1679, provided that the return to the writ shall be made "within three days after the service thereof" unless the distance to the court is between 20 and 100 miles, in which case ten days is allowed, or if greater than 100 miles, then 20 days. (Section II) Failure to comply made the keeper of the prisoner liable to forfeit to the prisoner 100 pounds for the first offense and for the second offense 200 pounds as well as loss of the keeper's office. (Section V). See, Blackstone, 3 *Commentaries on the Laws of England*, 129-137 (1768).

[36] Harper had been the principle drafter of the 1801 Judiciary Act, 2 Stat. 89, which produced the midnight judges controversy that led to *Marbury v. Madison*. 5 U.S. 137 (1803) See, Haskins and Johnson, II, *Foundations of Power: John Marshall, 1801-15, History of the Supreme Court of the United States* (Devise History) 123-26 (1981).

> and certainly to exclude every man of character, talent and respectability of every party? Will not such courts, therefore, be necessarily filled by the meanest retainers, the most obsequious flatterers, and the most servile tools of those in power for the moment? Can anything like independence or integrity be expected from such judges? Will they not act continually under the influence, not merely of their own party passions and prejudices, but of hope and of fear, those great preverters of the human mind? The precedent is already set that they may be turned out of office by the abolition of their courts; and their hopes of promotion to a higher station, and a better salary will depend on their servility and blind obedience to those in power. Let it be once established by the authority of this court, that a commitment on record by such a tribunal, is to stop the course of the writ of habeas corpus, is to shut the mouth of the Supreme Court, and see how ready, how terrible, and how irresistible an engine of oppression is placed in the hands of a dominant party, flushed with victory, and irritated by a recent conflict; or struggling to keep down an opposing party which it hates and fears. We unfortunately know, from the experience of every age, that there are few excesses into which men may not be hurried by the lust of power or the thirst of vengeance." *Ex Parte Bollman*, 8 U.S. at 89-90.

Such concerns are at the heart of the constitutional system of checks and balances, of Article III courts, and the complex federal system. The impartiality of state courts is not something that ranks as a constitutional assumption; indeed, quite the opposite.[37] When state judges are elected, as they

[37] The concerns of *Bushell's Case* are as central today as they were centuries ago to understanding and appreciating the importance of the criminal trial jury. This court sits, unlike British courts, under a written constitution which includes textural recognition of both federal preeminence, Article VI, Cl. 2 (Supremacy Clause); and concern with potentially biased state courts, Article II, Section 2, cl. 1 (diversity jurisdiction) Section 2254 is but one means of implementing the concern of the drafters of the Constitution and its amendments

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often are (as are Wisconsin Supreme Court justices, Wisconsin Constitution, Art. 7, Section 4) the assumption of impartial judicial action may be more suspect – particularly as against "thirst of vengeance or lust of power." When the case involves a victim, as in the instant case, who was the District Attorney of Buffalo County, Wisconsin, that suspicion is heightened. A special prosecutor for the county may be under considerable political and professional pressure to ensure a conviction. The temptation to take short cuts with constitutional protections may be very real. Elected state judges are also subject to political pressure. That the Court of Appeals of Wisconsin reversed the conviction in Mr. Brecht's case (Jt. App. 38) may illustrate that not all state judges are so impacted; however, this court's ruling regarding section 2254 will apply in many and varied situations.

It is particularly appropriate to place the burden upon the states to demonstrate the harmlessness of constitutional error occasioned by prosecutorial misconduct. See, *Note, Harmless Error, Prosecutorial Misconduct and Due Process: There's More to Due Process than the Bottom Line*, 88 Colum. L. Rev. 1208 (1988). Such assignment of the burden is appropriate in that each of the policy reasons supporting *Strickland v. Washington*, 466 U.S. 668, 693 (1984) is absent (i.e. the government was not responsible for and thus unable to prevent ineffective assistance by defense counsel). Moreover, the ordinary burden of proof rules place such burdens upon the state in criminal law cases (constitutionalized by *In Re Winship* 397 U.S. 358 (1970)), and the common law policy customarily assigns the duty to demonstrate impact upon the outcome upon the party who benefitted from the error. *Note, Harmless Error*, 88 Colum. L. Rev. at 1318-1320.

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to secure federal constitutional guarantees in the states. Congress early on enacted legislation that implemented the Constitution's vision of the proper relationship of federal and state courts. See *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), and *Cohens v. Virginia*, 19 U.S. 264 (1821); See also sections 13 and 14 of the Judiciary Act of 1789.

C. This Court's Role in Maintaining the Writ of Habeas Corpus

The connection between habeas corpus and fundamental liberties has long, deep roots.[38]

> "[S]uch great liberties as worship and speech will go on somehow, despite laws, but not liberty of the person. Censorship can be evaded; prosecutions against ideas may break down; a prison wall is *there*. Only habeas corpus can penetrate it. When imprisonment is possible without explanation or redress, every form of liberty is impaired. A man in jail cannot go to church or discuss or publish or assemble or enjoy property or go to the polls." Chaffee, Vol. II, *Documents on Fundamental Human Rights*, at p. 1 (Athenium, New York, 1963 ed.)

It is thus important that the writ of liberty remain viable, and so long as Congress fails to amend section 2254, that the writ run to test the validity of state court convictions.

However, the decision by the United States Court of Appeals for the Seventh Circuit *de facto* shifts the burden of proof regarding the error from the state to Mr. Brecht. See Seventh Circuit Opinion, Jt. App. 127-128. That opinion

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[38] William Penn wrote of the treatment of the jurors in *Bushell's Case*:

"That the late proceeding of the Court, at the Old Baily, is an evidence Demonstration, that Iuries are now but *meer Formality*, and that the partial charge of the Bench must be the Verdict of the Iury; for if ever a Rape were attempted on the Conscience of any Iury, it was there. And indeed the ignorance of Iurors, of their authority by Law, is the only Reason of their unhappy cringing to the Court, and being scared into an *Anti-Conscience Verdict*, by their lawless threats.

But we have lived to an Age, so deboid from all humanity and reason, as well as Faith and Religion, that some stick not to turn *Butcher to their own Privileges, and Conspirators against their own Liberties*. For however *Magna Charta* had once the reputation of a sacred unalterable Law . . . yet it is frequently objected now, that the benefits there designed *are but temporary*, and therefore lyable to alteration, as other Statutes are." William Penn, *The Peoples Antient and Just Liberties Asserted in the Tryal of William Penn and William Mead* 47 (1670).

ignores representations at oral argument that under any standard short of complete deference to the last state court decision, Mr. Brecht was still entitled to the grant of the writ of habeas corpus. Petition for Rehearing and Suggestion for Rehearing en banc, Jt. App. 135.[39]

Mr. Brecht's accident justification and the presence or absence of intent to kill was by no means demonstrated by the record in this case. Many pieces of evidence are credible and undisputed that tend to refute guilt on the murder charge. Such evidence includes Brecht's flight with little more than a dollar in his pocket and with no weapon, Tr. at 360-61; the auto accident which involved skidding on loose gravel, Tr. at 318; the bullet jammed perpendicularly into the gun left outside the house, Tr. at 264, 591; all tend to demonstrate a panic reaction and tend against inferences of premeditation. The essence of the matter in dispute, and the only matter in dispute, was the drawing of such inferences, inferences for or against Mr. Brecht's intent to kill. Yet the drawing of such inferences is at the heart of the historic jury function. See *Bushell's Case* 124 Eng. Rep. 1006 (1670).

The Seventh Circuit discusses the application of its new standard in a few short pages. That discussion ignores the central position of Mr. Brecht's credibility in the case upon the only item at question, intent to kill. See, Jt. App. 137. The opinion fails to mention the statement by Mr. Hartmann in response to a question after the shooting, "Did he [Todd Brecht] have something against you? *Answer, I don't know.*" Tr. at 164, 175.[40]

The standard adopted by the Seventh Circuit in this case, proposes the substitution of another difficult standard, one

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[39] See also, Petitioner-Appellee's Brief in the United States Court of Appeals for the Seventh Circuit, at 29.

[40] The various, factual inaccuracies contained in the opinion by the Seventh Circuit, some of which were listed in the Petition for Rehearing and Suggestion for Rehearing En Banc, Jt. App. 138 – 141, illustrate the danger of an appellate court attempting to put itself in the position of the trial jury. The appellate court very clearly went awry in this case, perhaps in its "burning interest" in a certain subject. Jt. App. 128 (J. Cudahy, concurring).

developed by this court for cases of direct appeal of federal convictions. However, while sitting over a direct appeal of a federal conviction this court exercises different authority than on collateral review under 28 U.S.C. section 2254. While sitting on collateral review of state convictions this court lacks supervisory authority. Instead, it acts as a constitutional court, a function that in one sense limits the scope of this court's functions, but in another emphasizes the fundamental importance of the power exercised.

With the virtual elimination of all mandatory direct appeal routes to this court, there exist few if any criminal convictions that this court must review as a matter of right. Instead, this court exercises certiorari discretion to scrutinize cases it wishes to hear. This court cannot review the merits in more than a handful of criminal cases. So long as this court continues to employ a "harmless error" standard of review on direct review of constitutional error, continuation with the same standard on habeas review, permits lower federal courts to perform important screening functions to eliminate the many cases in which claimed error is either not error, or if error not constitutional error, or harmless. With such screening provided by lower federal courts on collateral attack, this court can have confidence that cases such as *Giddeon v. Wainwright,* 372 U.S. 335 (1967) will be identified by some federal court.

Issues of whether it is improper to permit review after "delay, often extended," Seventh Circuit Opinion Jt. App. 120; or after, "opportunities for new errors" "at a new trial" Jt. App. 121; or whether, "high costs of ordering retrials many years after the events, may incline [federal courts] to dilute the standard of harmlessness," Jt.App. 121; are appropriately either for Congress to address, or else within this Court's power to address should new error occur. Indeed, relaxing federal scrutiny at the "harmless error" level, is unlikely to encourage state courts on direct review to scrutinize with particular care; rather they are more likely to "relax their own vigilance." Seventh Circuit Opinion, Jt. App. 122. State judges are far more likely to expect scrutiny from local federal district judges than from this court on certiorari.

D. A New Standard is Not Appropriate Since it Could Generate Substantial New Burdens for Federal Courts

Moreover, the "harmless error" standard is difficult enough for courts, state and federal to apply; importing yet a new standard into collateral habeas attack would only further complicate the matter. Indeed, instead of reducing the need for scrutiny, as the Seventh Circuit appears to believe, the standard requires the federal courts to engage in a complicated balancing test that must be accomplished by weighing the entire record in every single case. While this may be an obligation of a court on direct review, it is by no means necessitated by the practical reality of collateral review on habeas. Yet application of the *Kotteakos* standard on habeas would require the district judges become masters of such state trial records. Effective review would require the records be fully mastered. Rare filing of extensive state trial records may become the norm, increasing the burden on federal courts.

It is already apparent that the harmless error standard is difficult enough to apply. Many different versions of that facially simple standard have been detected. Field identified three different meanings of harmless error:

> 1. The first approach focuses upon the erroneously admitted evidence (or other constitutional error) to ask whether it might have contributed to a guilty verdict.
>
> 2. The second approach asks whether, once erroneously admitted evidence is excluded, there remains overwhelming evidence to support the jury's verdict.
>
> 3. The Third approach asks whether the tainted evidence is merely cumulative – that is, merely duplicative of some remaining admissible evidence. Field, *Assessing the Harmlessness of Federal Constitutional Error – A Process in Need of a Rationale,* 125 Yale L.J. 15, 16 (1976).

Field found examples of each approach. *Id.* Such confusion surrounding the meaning of the harmless error standard

has frequently been identified. See, Stacy and Dayton, *Rethinking Harmless Constitutional Error,* 88 Colum. L. Rev., 79, at 81-82, nn. 13, 14. That understanding is further complicated by the need to understand the difference between "structural errors" and "trial errors" identified by this court in *Arizona v. Fulminante.* In the context of the case at bar, for example, although the constitutional error might be classified as trial error, the error was so fundamental to the structure of the case described by the special prosecutor at closing argument that it ought to be classified as structural error.

How can a reviewing court, state or federal, consider the impact of constitutional errors violating the Miranda right to silence, when those errors are so central to the prosecution's theory of the case? Once a court determines it cannot exclude the possibility of harm, when that possible harm runs to the core of the prosecution's theory, valuing the level of that harm is as fruitful as debating the number of angels that can fit on the head of a pin.[41]

Psychology research suggests this is an incredibly difficult task, perhaps beyond current human predictive powers. More particularly, there is, "[S]trong evidence demonstrating that appellate judges cannot and do not accurately gauge the impact that particular evidence had or would have had upon a particular jury that convicted the defendant."[42]

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[41] Compare, *Wainwright v. Greenfield,* 474 U.S. 284 (1986) (silence as related to sanity issue); See also concurring opinion by Chief Justice Rehnquist at 474 U.S. 301, "a minute extract" from the prosecutor's closing argument can be deemed harmless – quite a different situation from that at bar.

[42] Stacy & Dayton, *Rethinking Harmless Error,* 88 Colum. L. Rev. 79, 129, n 186 (1988), referring to Teitelbaum, Sutton-Barbere and Johnson, *Impact of Improper Evidence Upon Juries,* 1983 Wis. L. Rev. 1147. Teitelbaum reports substantial disagreement as to the importance of improper testimony regarding the defendant's refusal to speak to a police officer after an accident; disagreement not only among laypersons but also reflected among lawyers (who Teitelbaum considered surrogates for judges). See Teitelbaum, *supra* at 1200-1201, Appendix 2, Tables 1 & 2, item 8, q. 14 at 1183, and 1164. Teitelbaum considered the data demonstrated wide disparity among layperons, significant lack of agreement among lawyers, and concluded, "For reviewing courts to conclude that a given item of proof, or a given argument did, or did not carry balance tilting weight with a particular jury appears, therefore, to be a most speculative enterprise." *Id.* at 1183.

E. Chapman Promotes Both Truth Finding and Public Respect for Justice

The harmless error rule serves two functions, recognized by this court in *Arizona v. Fulminante*, 113 L.Ed.2d at 330:

> "In applying harmless-error analysis to these many different constitutional violations, the Court has been faithful to the belief that the harmless error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' "

Those functions means that full vitality should continue to be accorded harmless error review for all state habeas cases. Congress assumes the harmless error standard not only to be the current standard, but also the appropriate standard.[43]

Moreover, examination of the legislative history detailed above as well as this court's decisions from *Kotteakos* through *Arizona v. Fulminante* reflects a consensus for the greater part of this century that constitutional error is different from other sorts of error.

Issues of factual accuracy abound in any application of *Miranda* rules, whether on collateral or direct attack. The

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[43] Indeed, as indicated above, certain members of Congress firmly believe that *Fulminante* errors can never be considered harmless and require retrial. The only authority cited for the silence of Congress in the opinion by the Seventh Circuit is a 1990 article, predating all of the Congressional reaction to this court's *Arizona v. Fulminante* decision. Part III C of the opinion, Jt. App. 123. That portion of the article cited omits any examination of the Congressional treatment of *Chapman*. (indeed, there is scant support if any cited for the authors opinions) but argues for the power in this court to innovate about habeas corpus until Congress restricts that power. Jeffries and Stunt, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U.Chi.L.Rev. 679, 709 (1990) Such argument ignores centuries of habeas corpus law, and more particularly the quarter of a century of experience by state and federal courts applying the *Chapman* standard. Part III C of the opinion by the Seventh Circuit fails as well to mention *Wainwright v. Greenfield*, 474 U.S. 284 (1986) as another example of this court employing the *Chapman* standard on collateral attack. Jt. App. 125-6.

court in *Bass v. Nix*, 909 F.2d 297 (8th Cir. 1990) disagreed with Judge Easterbrook that *Doyle* is a "prophylactic" rule. Instead the rule was, "at its heart, concerned with the ability of the adversarial system to find the truth." 909 F.2d at 305 n.14.

Deterrence of prosecutorial misconduct is, however, not an unimportant factor. Comments on silence, comments on what could have been but was not said, are powerful tools.

In cases covered by *Stone v. Powell*, 428 U.S. 465 (1976) the "truth" of improperly admitted physical evidence is in no way impeached by improper admission. However, "truth" bears a central relationship to the values underlying the mandates of *Miranda*. See, Stacy, *The Search for Truth in Constitutional Criminal Procedure*, 91 Colum. L.Rev. 1369 (1991) Constitutional error in admitting *Miranda* precluded testimony goes straight to the guilt or innocence of the defendant, directly to the heart of the conviction.

The standard of review, which in the harmless error instance, incorporates the heavy burden of proof placed upon the state, is most important in close factual cases.[44]

The instant case is a close case on the facts, closeness which can be measured objectively by the fact that every reviewing court has reversed the result of the court preceding it, or subjectively by the facts and arguments at trial. When the victim himself stated that he did not know why the shooting occurred, it was for the jury, not a judge, to determine whether Mr. Brecht's accident defense was true or not.

As this court stated in *Doyle v. Ohio*, 426 U.S. 610, at 617 (1976), "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested."[45]

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[44] What is particularly perplexing, is that Mr. Brecht's testimony at trial, so depreciated by the special prosecutor's closing arguments, was in essence contained in the opening statement by Brecht's trial counsel. Jt. App. 6-10.

[45] The opinion by the Seventh Circuit cites *Raffel v. United States*, 271 U.S. 494 (1926) at part III A, Jt. App. 109, a decision whose vitality at least in federal courts has been questioned, *Jenkins v. Anderson*, 447 U.S. 231 (1980) (concurring opinion by Justice Stephens joined by Justice Stewart at 241 n.2)

In Mr. Brecht's case, the fact that Brecht intimated during the process of being arrested that he wanted to talk to detectives, Jt. App. 36, may have made his subsequent failure to talk from his arrest until trial significant. That promise, along with its apparent breach as emphasized by the special prosecutor's argument, may have been what moved many, or none of the jurors to convict Mr. Brecht. Only those jurors can ever know the weight of this inference. Yet this inference is but one of many inferences from undisputed testimony the jury could draw. The importance of possible inferences that may be drawn from silence moved the Pennsylvania Supreme Court to hold under its state constitution that failure to give a "no adverse inference" charge to the jury *can never amount to harmless error. Commonwealth v. Lewis*, 589 A.2d 975, 981 (Pa. 1991) (see also cases cited from sister states at n.10, at 980). However, no adverse inference charge was given to Brecht's jury.

Mr. Brecht's case is comparable to that held *not* to constitute harmless error in *Satterwhite v. Texas*, 486 U.S. 249 (1988) (prediction of future dangerousness in the sentencing phase of a trial given by a psychologist – the constitutional error was a 6th amendment violation of the right to counsel). In *Satterwhite*, this court stated:

> "In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its narrow task of assessing the likelihood that the error materially affected the deliberation of the jury." 486 U.S. at 256, citing *Holloway v. Arkansas*, 435 U.S. 475 at 490-91 (1978) The question there, as here, "[I]s not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 486 U.S. at 258-59.

Just as Dr. Grigson's testimony was central to the state's case and devastating to the accused in *Satterwhite*, comments on

Brecht's silence were central to the state's case and just as devastating to Mr. Brecht's defense.

The *Chapman* standard should not be tampered with on habeas. As Judge Cudahy's concurring opinion illustrates, until the Brecht decision it was clear in the Seventh Circuit that the harmless error standard applied to review of state convictions. Jt. App. 128-29. The United States Court of Appeals for the Eighth Circuit also understands *Chapman* applies. *Bass v. Nix*, 909 F.2d 297 (8th Cir. 1990); *Clark v. Wood*, 823 F.2d 1241 (8th Cir. 1987); *United States v. Disbrow*, 768 F.2d 976 (8th Cir. 1985), *Miller v. Greer*, 789 F.2d 438, 443 (7th Cir. 1986) (harmless error standard applied by all Circuits, fn. 14, rev'd on other grounds 435 U.S. 756 (1987)).

Moreover, this court applied *Chapman* in cases beyond those listed in Part III C of the Seventh Circuit's opinion. Jt. App. 125-26. For example, see, *Moore v. Illinois* 434 U.S. 220 (1976); and *Milton v. Wainwright*, 407 U.S. 371 (1972). Thus the issue should not have been treated as an open question.[46]

F. The Proper Chapman Test is Material Impact upon Jury Deliberation

The understanding of the test articulated by *Satterwhite* should be reemphasized as the appropriate understanding, i.e. that constitutional error may have materially affected the jury's deliberation, 485 U.S. at 256, and that the error did not contribute to the verdict of the jury. 485 U.S. at 258-59. The burden to prove this should rest upon the state.

Understanding the harmless error standard in this way is consistent with psychological research demonstrating the complexity of the decision process of the jury. Such understanding is also consistent with tradition, and the understanding of Congress, both now and at the launching of "harmless error" tests in the early part of this century.

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[46] For the unusual way in which the issue arose and was dealt with in the court below, see, Petition for Rehearing with Suggestion for Rehearing En Banc, Jt. App. 134-136.

Applying the harmless error test, which is just what the Untied States District Court for the Western District of Wisconsin did, results in the necessity of granting the writ of habeas corpus, and letting the state retry Mr. Brecht if it wishes.

CONCLUSION

Wherefore, petitioner prays for reversal of the judgment below and reinstatement of the order of the United States District Court for the Western District of Wisconsin of March 14, 1991 granting the writ.

Respectfully Submitted,

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Court Appointed Counsel
For Petitioner

Supreme Court, U.S.
FILED
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No. 91-7358

In The
Supreme Court of the United States
October Term, 1992

TODD A. BRECHT,

Petitioner,

v.

GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does the habeas statute, 28 U.S.C. § 2254, require the federal court to grant habeas relief if the state cannot prove that the prosecutor's use of the defendant's post-*Miranda* silence to impeach his trial testimony (a *Doyle* violation) was harmless beyond a reasonable doubt?

2. Is the standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires the state to prove the error was harmless beyond a reasonable doubt, the proper standard to review a *Doyle* violation on federal habeas corpus review?

3. If the *Chapman* standard is not the correct standard for review of a *Doyle* violation on federal habeas corpus review, what is the correct standard?

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No. 91-7358

In The

Supreme Court of the United States

October Term, 1992

TODD A. BRECHT,

Petitioner,

v.

GORDON A. ABRAHAMSON, SUPERINTENDENT,
DODGE CORRECTIONAL INSTITUTION,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT

STATUTORY PROVISION INVOLVED

(in addition to those set forth in petitioner's brief)

§ 2254 State custody; remedies in Federal courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a

State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Summary of holdings of lower courts.

Each of the previous courts reviewing this case has held that the prosecutor violated *Doyle v. Ohio*, 426 U.S. 610 (1976), by referring to Brecht's post-*Miranda*[1] silence in two questions on cross-examination and in comments during closing argument. But each court in turn reached the opposite conclusion of its predecessor on the question of whether the error was harmless. Applying *Chapman v. California*, 386 U.S. 18 (1967), the Wisconsin Court of Appeals held the error was not harmless beyond a reasonable doubt and reversed the conviction (J.A. 49). The Wisconsin Supreme Court reinstated the conviction, holding the error was harmless beyond a reasonable doubt in light of the infrequency of the error, the permissible evidence that the defendant fled without seeking help for the victim, the permissible evidence of his pre-*Miranda* silence which was much more damaging to his credibility than his post-*Miranda* silence, and the strong circumstantial evidence of guilt (J.A. 66-68, 73). The federal district court held the error was not harmless beyond a reasonable doubt because the untainted evidence was not overwhelming (J.A. 91-93). The United States Court of Appeals for the Seventh Circuit reversed the district court, holding that the *Chapman* standard is not the appropriate standard for habeas review of a *Doyle* violation. Applying the less stringent standard of *Kotteakos v. United States*, 328 U.S. 750 (1946), and *United States v. Lane*, 474 U.S. 438 (1986), the court held the error harmless (J.A. 116-28).

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[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

The proper standard of review of a *Doyle* error on federal habeas corpus brings the case to this Court (J.A. 148).[2]

Summary of relevant trial facts.

On October 12, 1985, Molly Hartman and her husband, Roger, then district attorney of Buffalo County, Wisconsin, drove to Georgia to secure the release of Molly's younger brother, Todd Brecht, from prison (Tr. 390-91; J.A. 51, 76). Brecht had been convicted of felony theft. By paying his $3,750 restitution, the Hartmans were able to get Brecht released and placed on probation and to have his probation transferred to Wisconsin (Tr. 391; J.A. 51, 76). The Hartmans brought Brecht to their home in Alma, Wisconsin, where he was to stay for a short period awaiting an opening in a halfway house (Tr. 392; J.A. 51, 76). The Hartmans were both recovering alcoholics (Tr. 393-94). Brecht was also an alcoholic and had been getting into trouble with the law (Tr. 387). He had previously discussed his homosexuality with the Hartmans (Tr. 392). As a rule of staying in their home, the Hartmans told Brecht that he could not drink alcohol or engage in homosexual activity in the Alma area (Tr. 392; J.A. 51, 76). In the past, they had refused to allow him to bring his homosexual friend to their home (Tr. 400). Roger had a difficult time understanding male homosexuality or

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[2]In the lower courts, Brecht claimed that the use of *all* of his pretrial silence and conduct was error. The Wisconsin Supreme Court and both federal courts upheld the use of all of Brecht's pre-*Miranda* silence and conduct. Brecht did not challenge those rulings in his petition for certiorari or in his brief in this Court and thus they are not before the Court. Brecht did challenge the Seventh Circuit's rulings on two evidentiary issues. This Court denied certiorari on those issues. Therefore, the state has not included the facts relating to those issues except to the extent necessary to place the relevant evidence in context and to explain the *Doyle* violations that are before the Court.

accepting a homosexual brother-in-law (Tr. 393). It was also a condition of Brecht's probation that he was not to violate the law, become intoxicated, or leave the state without permission (J.A. 51).

In the few days between Brecht's arrival and the shooting, the Hartmans took Brecht to Eau Claire to find out about the halfway house, bought him clothes, took him to an A.A. meeting, and loaned him one of their cars so he could go to Eau Claire to meet with his probation agent (Tr. 394-95, 424-26). Brecht never really expressed any appreciation for what the Hartmans were doing for him (Tr. 421).

On the day of the shooting, October 17, 1985, Roger and Molly Hartman each went to work in the morning (Tr. 402, 138). About 5:30 p.m. on October 17, Roger Hartman left his office, which was about five to ten minutes away from his home (Tr. 138-39). About 5:45 p.m., his neighbors, Grant and Charlotte Seitz, heard their doorbell ringing frantically. They opened the door and Roger came in. He collapsed, saying he had been shot with a .22 by Todd Brecht and telling them to call an ambulance and the sheriff (Tr. 150-51, 164). When Mrs. Seitz told him she had just seen Molly come home, Roger responded, "Oh my God, don't let her go in that house, don't let her near that house" (Tr. 166). He said, "[h]e's down there in the house in the basement" (Tr. 153). Roger told Mrs. Seitz that he had sneaked out the basement door and crawled on his knees to get to her house (Tr. 167). When Grant started to go to the Hartmans to get Molly, Roger told her, "[d]on't let Grant go down there" (Tr. 169). Later at the hospital, Roger told the emergency medical technician to tell the police to find Molly and make sure she didn't go near Brecht (Tr. 190). He told police that Brecht took Molly's car and that he was on probation (Tr. 219).

While searching the Hartman home, police found a spent .22 bullet lying on the floor of the lower level of the

home and an empty .22 casing toward the opposite end of the hallway; a bolt action, semi-automatic .22 rifle was on the patio outside the family room with a live round of ammunition jammed in the chamber; an empty gun case was found upstairs in the room Brecht had been using and two ammunition boxes with .22 ammunition were found under the covers of his bed (Tr. 222-26, 263-64, 299, 300). Empty beer cans were found in the house and a soda can with a bullet hole in it and a spent .22 casing were found in the backyard (Tr. 265, 272, 274-75). The receiver was next to the telephone in the master bedroom, making the other phone in the house inoperable (Tr. 222, 255-56). The hallway area was covered with tightly stretched carpet and there was nothing there which would cause anyone to trip (Tr. 259-60; *see also* J.A. 52-53). Later, a block of knives which Molly always kept on the kitchen counter was found in a cabinet under the sink (Tr. 408-09).

As he was fleeing the area, Brecht ran the car into a ditch (Tr. 318-19). A police officer, Zeller, stopped to offer Brecht assistance, but Brecht told him his sister would call a wrecker (Tr. 332; J.A. 53). He then went to a local residence, and the resident (Schlesselman) gave him a ride to Winona, Minnesota (Tr. 344-47; J.A. 53, 77). Brecht said nothing to either Zeller or Schlesselman about the shooting incident; he did not mention Hartman or request that they call the police or an ambulance (Tr. 349; J.A. 53, 77).

A short time later, the local police approached Brecht in Winona. He lied about his identity and where he was from. He was taken into custody based on the Wisconsin shooting incident (Tr. 356-58; J.A. 53, 77). He told the arresting officer, Papke, that it was a big mistake and he wanted to talk to someone who would understand him, but he did not tell Papke the shooting was an accident and he did not explain what was a big mistake (Tr. 363-64; J.A. 53, 77-78). When the defendant was searched, the police found fourteen rounds of .22 long rifle ammunition in his

pocket (Tr. 361). The arresting officer testified that defendant was not given his *Miranda* rights; they were merely holding him for the Wisconsin authorities (Tr. 366–67; J.A. 53, 78). Later a Buffalo County officer served defendant with an arrest warrant while defendant was in the Winona holding cell, but he did not give him his rights (Tr. 303). The record indicates Brecht was first given his *Miranda* rights at his initial appearance in court (J.A. 53, 78). Brecht never testified that he was given his rights by anyone at an earlier time.

The State also elicited evidence that Roger was six feet tall and the path of the bullet through his body was essentially horizontal, slightly downward (Tr. 554). It entered through his back and exited through his chest. Roger died later as a result of complications from the wound. The murder weapon had a normal trigger pull and it would not fire unless the trigger was pulled. It was semi-automatic, requiring a separate pull to fire each bullet (Tr. 479–96).

After the State had presented its case, Brecht testified. He testified that on the day of the shooting, he drank beer and some liquor (Tr. 581). He loaded the rifle and shot at cans (Tr. 582). When he saw Roger drive up, he wanted to hide the gun because he did not have permission to use it and he wanted to hide the beer cans because he knew Roger would be disappointed in him for drinking (Tr. 586). He didn't remember the gun was loaded, he stumbled, and the gun went off. When he realized Roger was gone, he went to look for him, still holding the gun. He was so upset that he was going to shoot himself, but he couldn't get the gun reloaded so he threw it down. Then he decided to take Roger's car to look for him. He saw Roger standing at the neighbor's door, so he knew he was getting help. He was on probation and just wanted to get away; he didn't know how badly Roger was hurt; he just took off until he ran the car into the ditch (Tr. 587–96). He testified that he did not intend to shoot Roger; he had no reason to hurt

him or Molly; it was an accident (Tr. 602; *see also* J.A. 52, 76–77).

On cross-examination, the State elicited Brecht's admission that he often lies (Tr. 605, 611). He testified that his plan was to stay in Wisconsin, work, not drink, and change his sexual preference (Tr. 616, 617). The prosecutor impeached this testimony with letters Brecht had written, with homosexual overtones, to a jail inmate friend in Georgia, in which Brecht indicated he would do anything for his friend and would get the money to bail his friend out, even if it was $50,000 (Tr. 621–22; J.A. 71). This suggested Brecht's real plan was to leave Wisconsin in violation of his probation and help his friend, which provided one possible motive for the crime (J.A. 71). On the morning of the murder he had called the Georgia jail to find out the bail amount and told the jailer to tell his friend to hold on, he would be coming up with the bail money soon (Tr. 630). Brecht was cross-examined on why he had to come in behind Roger to sneak up the stairs to put the gun away when he could have hidden it in any number of easier places; why he didn't put the gun down as soon as the accident occurred; why he got in the car to look for Roger instead of searching the grounds around the house for him and why he didn't seek assistance to call for an ambulance or tell the first citizens and officer at the ditch about the accident (Tr. 652–76).

The only questions on cross-examination which were held by the Wisconsin Supreme Court and the federal courts to violate *Doyle* are the following two questions: "In fact the first time you have ever told this story is when you testified here today was it not?" (Tr. 681; J.A. 64, 81) and, on redirect, "Did you tell anyone about what had happened in Alma?" (Tr. 720; J.A. 65, 81).

The defense called a jailer who testified he overheard Brecht say on the telephone that he didn't mean to shoot or kill anybody or for anybody to get murdered. Then,

Brecht said, "I can't talk now, there's [sic] cops in the room" (Tr. 727).

The following comments were held to be impermissible comments on post-*Miranda* silence (impermissible portion italicized): "however the problems with motive are simply that they are inside the actor's head and there is no way we can look inside of that actor's head *and remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence*, and there aren't any CAT scans like we use for gall bladders or kidney stones or lungs to look inside of somebody's head to find out motive" (Tr. 793; J.A. 65, 82), and, "What is a lie, let's talk about the anatomy of a lie. One thing a person can do when there are certain physical facts, they can come in and deny them or when they're overwhelming you carefully tailor your story to fit with the facts as known to the State, or to anybody else for that matter, but you just give a different interpretation to it and that's specifically what this defendant did. Remember *he made no statements to the law enforcement officers*, James Zeller or the Winona Police. *He sits back here and sees all of our evidence go in and then he comes out with this crazy story*"[3] (Tr. 801; J.A. 65, 82).

On closing argument, defense counsel stated, "Now what would you do, and use your common sense, if somebody handed you a piece of paper, and you're sitting in a police station and it says attempted murder on it, and the State is making a big deal about him using the word murder, I know what I would do, I would call somebody that I knew and I would say, 'I didn't murder anybody'" (Tr. 873).

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[3]Only the district court found the phrase "he made no statements to the law enforcement officers" to be error. The Wisconsin Supreme Court and Seventh Circuit presumably realized it was limited by the qualifying phrase that immediately followed, "James Zeller or the Winona police," making it a permissible pre-*Miranda* reference.

In rebuttal closing, the prosecutor made the following statement, which the Wisconsin Supreme Court and federal courts held to be an impermissible use of post-*Miranda* silence: "Mr. Ridgeway [defense counsel] said, 'what would you say?' *I know what I'd say, I'd say 'hold on, this was a mistake, this was an accident, let me tell you what happened,' but he didn't say that did he. No, he waited until he hears our story*" (Tr. 888; J.A. 65, 82).

The jury, which was from a different county pursuant to a change of venue, was instructed on both first-degree murder (causing the death of a human being with intent to kill that person or another) and homicide by negligent use of a weapon (J.A. 24-28). The jury returned a verdict of first-degree murder.

SUMMARY OF ARGUMENT

First, the State assumes a *Doyle* violation entitles a state criminal defendant to reversal of his conviction on direct review unless the state proves the federal constitutional error harmless beyond a reasonable doubt under *Chapman*. The question is whether the same standard applies on habeas review. The Court must look first to the habeas statute. Congress has provided habeas review only for those state prisoners who are in custody in violation of the Constitution. Congress has not defined what it means to be in custody in violation of the Constitution, but has left it for this Court to define, just as it has let it define the scope of habeas review in other contexts. In formulating that definition, this Court must look to the concept of federalism implicit in our system of government and to the core purpose of habeas review, which is to provide relief from "the kind of criminal proceedings so fundamentally defective as to make imprisonment pursuant to them constitutionally intolerable." *Fay v. Noia*, 372 U.S. 391, 414 (1963).

If the habeas petitioner need only prove a federal constitutional violation to shift the burden to the state to prove the error harmless beyond a reasonable doubt, then habeas review is nothing more than another direct appeal, this time before a federal tribunal and perhaps years after conviction. Habeas review is not intended to be simply another round of direct review. Habeas review is inherently different from direct review; it is an extraordinary collateral attack on a final and presumptively valid state judgment. Accordingly, it should be governed by a different standard. It is inconsistent with the concept of federalism, the core purpose of habeas corpus and the nature of collateral review to require the state to shoulder the same heavy burden to prove a constitutional error harmless on habeas review that it bears on direct review.

A criminal defendant has no constitutional right to have the state prove a constitutional error at his trial was harmless beyond a reasonable doubt. While *Chapman* serves to remedy a federal constitutional error in a particular case, it also functions to deter such violations by placing a heavy burden on the state to show why a particular violation should not warrant relief on direct review. The prospect of further review by a federal court on a habeas petition likewise encourages state actors to operate in accord with the federal Constitution. It does not follow, however, that state actors will be any less deterred from violating federal constitutional rights if the test for harmless error which is applied on direct review in state court is not applied on habeas review in federal court.

Meanwhile, the costs to the criminal justice system from having identical standards of harmless error for each type of review would be prohibitive. This Court has reached the same conclusion in limiting habeas review of allegations of Fourth Amendment violations and in declining to apply new constitutional rules of criminal procedure retroactively on habeas review. The costs of applying the *Chapman* test

on habeas review of a *Doyle* violation are particularly troubling because of the nature of the violation. The *Doyle* rule prohibits the state from breaching an implied promise to the accused that his silence will not be used against him. Like the Fourth Amendment exclusionary rule, it limits what the government can do with evidence, no matter how probative the evidence is.

Moreover, neither due process nor the Sixth Amendment right to a jury trial requires extending the *Chapman* test to habeas review. Although the *Chapman* test is intended in part to accommodate the goal of having a jury determine guilt or innocence on the basis of a proper record, this goal is not diminished by applying a less stringent test than *Chapman* on habeas review.

The federal courts serve as guardians of federal constitutional rights by determining *de novo* on habeas review whether a federal constitutional error has occurred during the state criminal proceedings. Like a finding of federal constitutional error by a state court on direct review, a finding of federal constitutional error by a federal court on habeas review does not mean the state prisoner is entitled to relief. On direct review, relief is warranted if the state cannot show that the federal constitutional error was harmless beyond a reasonable doubt. On habeas review, however, relief is warranted only if the state prisoner is "in custody in violation of the Constitution." Even though federal constitutional error may not be harmless beyond a reasonable doubt, the state prisoner nonetheless may be in custody in accord with the federal Constitution. A state prisoner is "in custody in violation of the Constitution" only where there has been such an extreme malfunction of the state criminal justice system as to render the custody "constitutionally intolerable."

For all of these reasons, the *Chapman* test of harmless error is not a proper yardstick by which to measure

whether there has been an extreme malfunction of the state process warranting habeas relief.

The State respectfully offers alternative harmless error tests that are better suited than *Chapman* to ensure meaningful habeas review without unduly derogating the concept of federalism or the core purpose of habeas corpus. As one option, this Court could require the state to prove the constitutional error harmless, but impose the lesser burden of the *Kotteakos/Lane* standard as the Court of Appeals has already done in this case.

As a second option, this Court could hold that habeas relief is not warranted because the prisoner is not in custody in violation of the Constitution if, in spite of the constitutional error, the state can show a constitutionally sufficient basis for the custody. If the habeas court finds constitutional error, it would then review the untainted evidence to determine if it is sufficient to support the verdict under the sufficiency standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979). If the untainted evidence is sufficient to support the guilty verdict beyond a reasonable doubt, habeas relief must be denied. As an added protection in those cases where the state court found constitutional error but held it to be harmless under *Chapman*, the habeas court would also review that determination. Under a modification of Justice Harlan's approach in his *Chapman* dissent, the habeas court would review the state court's application of *Chapman* to make sure that *Chapman* was not applied arbitrarily or unreasonably, "manifesting a purpose to defeat federal constitutional rights." *Chapman*, 386 U.S. at 56 (Harlan, J., dissenting).

Both the *Kotteakos/Lane* option and the *Jackson v. Virginia*/Harlan option accommodate the valued differences between direct review and collateral review, the imperative of federalism, the goal of finality necessary to an effective criminal justice system, and the protection of the

constitutional rights of individual citizens. Adoption of the State's proposal would limit habeas relief to those cases in which custody is constitutionally intolerable because the state has no valid basis for imposing restraint on liberty.

Approaching the question in yet a different way, this Court could treat *Doyle* violations as it has treated other forms of prosecutorial misconduct and attorney error. Under this approach, a *Doyle* violation would not rise to the level of a federal constitutional violation at all unless it so infected the trial with unfairness that the resulting conviction is a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). A fair trial is one which can be relied on as having produced a reliable result. To obtain relief on habeas, the prisoner would have to show a reasonable probability that, but for the *Doyle* violation, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

ARGUMENT

I. THE *CHAPMAN* "BEYOND A REASONABLE DOUBT" HARMLESS ERROR TEST SHOULD NOT BE APPLIED ON HABEAS CORPUS REVIEW OF *DOYLE* ERRORS.

A. Introduction.

The State's first argument is that although *Chapman* is the correct standard for review of a *Doyle* violation on direct review, it is not the proper standard for determining when a *Doyle* violation should result in the granting of federal habeas corpus relief.

The State will support this argument by the language of the habeas statute, the core purpose of habeas, the imperative of federalism, the nature of collateral relief,

which is inherently different from direct review, the remedial nature of the harmless error doctrine, and the nature of a *Doyle* violation.

The State will show that application of *Chapman* on habeas is not necessary to ensure the full protection of constitutional rights by the states or to allow the federal courts to fulfill their proper role in the protection of constitutional rights. Refusal to apply *Chapman* on habeas is not inconsistent with due process or the Sixth Amendment right to jury trial.

Finally, the State will discuss alternative harmless error tests and will suggest a proposal for review of *Doyle* errors on habeas that limits habeas corpus to its core purpose, that does not skew the delicate balance of state and federal control of prosecution and punishment of crime, and that is fully consistent with Congressional policy by protecting state prisoners in custody in violation of the Constitution.

Alternatively, the State will argue that a *Doyle* violation, like other forms of prosecutorial misconduct, does not even rise to the level of a due process violation unless by itself it so infected the trial with unfairness that it made the resulting conviction a denial of due process. A defendant cannot show such a denial unless he can show a reasonable probability that, but for the error, the result of the proceeding would have been different.

B. Congress Has Granted The Federal Courts Narrow Authority To Provide Relief Only To State Prisoners Who Are In Custody In Violation Of The Constitution, Leaving It To This Court To Define When A Person Is In Custody In Violation Of The Constitution.

Section 28 U.S.C. 2254(a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court

shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

The statute does not define when habeas relief shall be granted.[4] The only clue is the language in § 2254(a) that the court shall entertain an application of a person in state custody on the ground he is "in custody in violation of the Constitution."[5] Based on this language, and the lack of any other language relating to the granting of habeas relief, the logical conclusion is that Congress has authorized the federal courts to grant habeas relief only to those persons who are in state custody in violation of the Constitution.

Petitioner and his amicus contend that relief on habeas must be granted whenever the state cannot meet the stringent standard of *Chapman*. They note that this Court at times has assumed that *Chapman* applies on habeas and that Congress has failed to adopt various proposals to limit habeas review. Neither factor is persuasive.

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[4]Section 28 U.S.C. 2241 grants the Justices of this Court and the lower federal courts the authority to grant writs of habeas corpus. Section 28 U.S.C. 2243 provides that the court shall "dispose of the matter as law and justice require." Sections 28 U.S.C. 2242-2253, 2254(b)-(f) and Rules 1-11, following 28 U.S.C. 2254, set forth various procedural rules governing the writ procedure. None of these provisions define when relief shall be granted.

[5]Because this case and most habeas cases allege custody in violation of the Constitution rather than in violation of laws or treaties of the United States, the State will confine its argument to that term.

This Court's assumption without discussion that the *Chapman* test does apply on habeas does not preclude it from considering and deciding whether that test *should* apply on habeas. In the cases petitioner and amicus cite, it appears the parties did not argue, and the Court did not consider, whether the *Chapman* standard should apply on habeas review. The question was raised, but not reached, in *Greer v. Miller*, 483 U.S. 756 (1987).

In *Teague v. Lane*, 489 U.S. 288 (1989), this Court did not hesitate to decide whether new constitutional rules of criminal procedure should apply retroactively on habeas just because it had failed to address that significant issue in prior cases. So, too, it should not hesitate to decide whether *Chapman* should apply on habeas review just because it has assumed so, without addressing the question, in previous cases. As Justice Frankfurter once said, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting), *quoted in Rose v. Mitchell*, 443 U.S. 545, 575 n.1 (1979) (Stewart, J., concurring).

Congress has not defined what it means to be "in custody in violation of the Constitution." Nor has Congress spoken to the questions of whether the harmless error doctrine applies on habeas review or, if it does apply, what form it should take. Thus, it is for this Court to give substance to the term "in custody in violation of the Constitution." It is for this Court to determine whether the harmless error doctrine applies on habeas review and, if so, what form it should take. *See generally McCleskey v. Zant*, 111 S. Ct. 1454, 1465 (1991) (Congress's silence on standard of abuse of habeas writ was not intended to foreclose judicial application of principles developed in prior cases); *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 446 (1987) (Court has duty to fill in gaps left by Congress); *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (courts may

establish modes of procedure when habeas statute silent on point).

The Court's role here is entirely consistent with the role it has taken in previous habeas cases. It has given substance to the "exhaustion of state remedies" requirement, it has defined the showing of "cause and prejudice" necessary to overcome a state procedural default, and it has mandated that new rules of criminal procedure will not be applied retroactively to cases on collateral habeas review. *See Rose v. Lundy*, 455 U.S. 509 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Murray v. Carrier*, 477 U.S. 478 (1986); *Teague v. Lane*, 489 U.S. 288. This Court has demonstrated an "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." *Wainwright v. Sykes*, 433 U.S. at 81. Congress has not indicated that it disapproves of the Court's role in defining the scope of the writ and in resolving issues which Congress has not addressed. This Court should have no qualms, therefore, about speaking to an issue, such as the standard for granting relief and the applicability of harmless error, on which Congress has not spoken.

This Court need not stay its hand simply because over the years Congress has declined to pass various legislative proposals which would impact on when habeas relief would be granted. Legislative inaction is a "weak reed upon which to lean" and it provides a "poor beacon to follow" to determine legislative intent. Singer, *Sutherland Statutory Construction*, 49.10, at 76 (5th ed. 1992); *Zuber v. Allen*, 396 U.S. 168, 185 (1969). *See also Scripps-Howard Radio v. FCC*, 316 U.S. 4, 11 (1942). This Court has said that it is generally "reluctant to draw inferences from Congress's failure to act." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988). The Court's reticence to rely on unpassed amendments that were proposed contemporaneously with the legislation at issue is even

more justified in regard to non-contemporaneous legislative proposals that were not passed. The multitude of reasons for non-passage of any particular proposal or package robs it of probative value. The Congressional records relied on by Brecht are particularly unilluminating of Congress's intent regarding whether *Chapman* should be applied on habeas review of *Doyle* errors. The quoted portion of Senator Heyburn's speech was in response to the directed verdict proposal that accompanied the harmless error test; President Taft's proposal did, in fact, focus on the outcome of the trial; and the debates addressing whether *Chapman* should be applied to coerced confessions never considered whether *Chapman* itself was a correct standard on habeas review. Reform measures which would have precluded the habeas court from hearing claims if the state courts had fully and fairly litigated those claims focused on non-reviewability, not the appropriate standard of review. If the Court is to rely on Congress's failure to pass certain proposals to discern the intent behind the legislation that was passed, it should do so only where the particular issue before the Court was specifically addressed and the reason for non-passage is clear. That is not the case here.

Until and unless Congress defines its terms in the habeas statute or sets forth a standard of habeas relief, the task is necessarily left to this Court, which must decide those cases that come before it and give guidance to the lower federal courts in applying the habeas statute. That this Court has historically given substance to the scope of habeas corpus and that Congress has not intervened indicates that the role played by this Court to date is consistent with Congressional policy and is what Congress intended.

The crux of the question before the Court, then, is whether habeas relief must be granted because a person is in custody "in violation of the Constitution" within the meaning of 28 U.S.C. § 2254 whenever a *Doyle* violation

has occurred during his state court proceedings which the state has been unable to prove harmless beyond a reasonable doubt under the *Chapman* test.

C. The Two Overriding Principles That Govern Habeas Jurisprudence, The Imperative Of Federalism And An Adherence To The Core Purpose Of Habeas Corpus, Dictate That The *Chapman* Test Should Not Apply On Habeas Corpus.

As it has always done, this Court will find the roots for a proper interpretation of the habeas statute in two overriding principles: adherence to the core purpose of habeas corpus and concern for the delicate balance of state and federal control in the prosecution and punishment of state crimes. It is not surprising that the development of the jurisprudence of habeas corpus has not been smooth in light of the variety of questions this Court has been called upon to address, each arising in a unique factual setting at a distinct time in history. *See Fay v. Noia*, 372 U.S. 391, 412 (1963). But what is remarkable, and compelling, is the consistency with which this Court has remained true to two overriding themes in constructing a principled habeas jurisprudence: the core purpose of habeas corpus and the delicate balance a dual federal-state system demands. Contrary to the claims of some critics, this Court has never lost sight of the unique role that habeas plays in permitting a federal court to ignore the usual constraints of finality and *res judicata* to provide relief in those exceptional cases where the state criminal process has been so fundamentally defective that the resulting confinement of an individual is constitutionally intolerable in our civilized society.

Perhaps most illuminating are those opinions of the Court which have been perceived by some as greatly expanding or liberalizing the scope of the writ of habeas

corpus. For even in those opinions, this Court did not neglect either the core purpose of habeas corpus or the imperative of federalism.

In *Brown v. Allen*, 344 U.S. 443, 465 (1953), the lead opinion recognized that both the state and federal courts have a duty to protect persons from violations of their constitutional rights. The oft-cited opinion of Justice Frankfurter, which had the approval of a majority of the Court, asserted that most claims of violations of federal constitutional rights are presumably dealt with adequately in the state courts. A wholesale opening of state prison doors by federal courts would be in disregard of the duty of federal courts to "support and not weaken the sturdy enforcement of their criminal laws by the States." *Brown v. Allen*, 344 U.S. at 497-98 (Frankfurter, J., separate opinion). Justice Frankfurter emphasized the duty of the Court to "give fair effect to the habeas corpus jurisdiction as enacted by Congress" in a way which accommodates "the complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other." *Brown v. Allen*, 344 U.S. at 498-500. Justice Frankfurter recognized that it is primarily the responsibility of the states to deal with crime, and he did not believe that federal habeas review was intended to, or should be allowed to, hamper the states in their effective discharge of that difficult responsibility. *Brown v. Allen*, 344 U.S. at 510-11. He viewed the Habeas Act of 1867 as enlarging only the *area of claims* that could be reached on habeas, not as enlarging or changing the "historic function" of the writ itself. *Brown v. Allen*, 344 U.S. at 500. This "historic function" is to provide relief in those rare cases where "there are meritorious causes in which habeas corpus is the ultimate and only relief and designed to be such." *Brown v. Allen*, 344 U.S. at 501.

In order to perform its historic function, a federal court cannot be bound by a state court's view of federal constitutional law. A federal court does not adequately perform the task assigned to it by Congress if it allows a state court to have "the last say" when there is the risk that the state court "may have misconceived a federal constitutional right." *Brown v. Allen*, 344 U.S. at 508.

But there is nothing in Justice Frankfurter's view that even remotely suggests that expanding the habeas statute to enable lower federal courts to review state prisoners' claims of unconstitutional restraint was intended to turn federal habeas review of state court convictions into "nothing more than a replay of the direct appeal, as one federal district judge and then three federal appellate judges duplicate the work of the more numerous state judges." *Brecht v. Abrahamson*, 944 F.2d 1363, 1370 (7th Cir. 1991) (J.A. 114). Rather, the "great writ" was intended to be limited to its historic role as a unique and exceptional remedy, the ultimate "safeguard of freedom in the Anglo-American world." *Brown v. Allen*, 344 U.S. at 512. While Justice Frankfurter recognized the importance of the writ, he also recognized that it has as much potential to do evil as it has to do good and that "[a]buse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization." *Brown v. Allen*, 344 U.S. at 512.

The potential of the writ to do evil and to threaten the forces of authority that are essential to our society will be realized if the writ is allowed to drift loose from its moorings, if it is regarded as nothing more than yet another round of direct review in which the same stringent test for harmless error that was applied in the state court is simply reapplied by a federal habeas court.

This Court's adherence to both the imperative of federalism and the core purpose of the writ did not end

with the landmark decision of *Brown v. Allen*. It is demonstrated perhaps even more forcefully in *Fay v. Noia*. Although this Court in *Fay v. Noia* viewed the scope of the habeas jurisdiction as very broad, it grounded the perceived need for such broad jurisdiction in the historic function of the writ itself. *Fay v. Noia*, 372 U.S. at 399–426. This Court has since retreated from the broad standard it adopted in *Fay v. Noia* for determining when claims not litigated in state court can be entertained on habeas. *See Wainwright v. Sykes*, 433 U.S. 72; *Coleman v. Thompson*, 111 S. Ct. 2546 (1991). But it has never retracted its strong articulation of the core purpose of the writ.

The Court in *Fay v. Noia* held the function of the writ is to provide a remedy for "whatever society deems to be intolerable restraints," restraints contrary to "the fundamental requirements of law." *Fay v. Noia*, 372 U.S. at 401–02. The function of the writ is to provide relief from restraints "'for a matter for which by law no man ought to be punished'" or for which the court could not determine if there was "'a reasonable ground of imprisonment.'" *Fay v. Noia*, 372 U.S. at 405, quoting *Habeas Corpus* (Bouvier ed., 1856), B 10 (Bacon's Abridgment).

From its inception, the writ was intended to be the remedy for "the kind of criminal proceedings so fundamentally defective as to make imprisonment pursuant to them constitutionally intolerable." *Fay v. Noia*, 372 U.S. at 414. Although the concept of what proceedings are "fundamentally defective" may change through the centuries, the core purpose of the writ to provide relief only from imprisonment that is "constitutionally intolerable" has not changed and should not change. "It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous, but void." *Fay v. Noia*, 372 U.S. at 423.

Habeas provides relief only to those persons "whom society has *grievously* wronged." *Fay v. Noia*, 372 U.S. at 441 (emphasis added). It is because the writ plays only this extraordinary and limited role that its availability in the federal courts to persons in custody pursuant to state convictions "offends no legitimate state interest in the enforcement of criminal justice or procedure." *Fay v. Noia*, 372 U.S. at 440.

It would trivialize this "historic function" of habeas relief to suggest that every state court trial at which a constitutional error was committed, which error the state could not prove harmless beyond a reasonable doubt, constitutes "the kind of criminal proceedings so fundamentally defective as to make imprisonment pursuant to [it] constitutionally intolerable." It is inconsistent with the core purpose of habeas corpus to suggest that "society has grievously wronged" a state prisoner solely because a constitutional error was committed at his state court trial and the state has been unable to meet the stringent burden of proving the error harmless beyond a reasonable doubt. Habeas corpus loses its historic meaning if relief may be granted due simply to the reasonable possibility that the error might have contributed to the verdict.

Yet this would be the result if the *Chapman* test is the standard of harmless error for habeas relief. It would be a result far, far removed from the core purpose of habeas corpus, one which ignores the constitutional imperative of federalism which underlies habeas jurisprudence and forms the cornerstone of the Constitution itself.

Properly construed, habeas review of claims of federal constitutional violations by prisoners in state custody should not interfere with the states' legitimate control of their criminal justice systems. Properly construed, habeas review should not make the habeas court into simply a super-appellate court. Properly construed, habeas review

should not require a remedy for every federal constitutional violation. Properly construed, habeas review should retain its historical purpose of providing relief to state prisoners from a final, presumptively valid state court judgment only in those rare cases where there have been "extreme malfunctions in the state criminal justice systems." *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring).

Neither the imperative of federalism nor the core purpose of habeas corpus requires that the *Chapman* test for harmless error apply on habeas review; indeed, they counsel against it.

D. The Nature Of Collateral Review, The Remedial Nature Of The *Chapman* Test, And The Nature Of A *Doyle* Violation Dictate That The *Chapman* Test Not Be Applied On Habeas Review Of A *Doyle* Violation.

1. Different standards are appropriate because of the inherent differences between direct review and collateral review.

Concluding that the *Chapman* test does not apply on habeas review is compelled by the principle that direct review is inherently different from collateral review. Direct review is the primary avenue for review of a conviction and when the process of direct review comes to an end, a presumption of finality and legality attaches to the conviction and sentence. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). The role of habeas corpus, although important in assuring that federal constitutional rights are observed, is secondary and limited; habeas corpus is not a forum to relitigate state trials. *Barefoot v. Estelle*, 463 U.S. at 887. On collateral habeas review, the criminal

defendant is challenging an otherwise final and presumptively valid judgment. *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987).

Until direct review is completed, a state judgment is neither final nor presumptively correct and valid. Because statutory time limits mandate that direct review occur reasonably promptly after conviction, memories of underlying facts are relatively fresh and if either a hearing on contested matters or a retrial thereafter is necessary, evidence is less apt to have lost its probative value. *See, e.g.*, §§ 808.04, 809.30, Wis. Stats. (1989-90). In addition, appellate courts which review cases on direct review do more than review the particular cases before them. Their decisions often establish precedent to guide the trial courts in future cases. In particular, direct review by this Court is essential to enable it to pronounce the final and controlling word on federal law which is conclusive on all other courts. *See Murdock v. City of Memphis*, 20 Wall. (87 U.S.) 590, 631-32 (1874). In contrast, the lower federal courts have power on habeas review only to release individual petitioners from state custody; their decisions do not make federal constitutional law which is binding precedent on the state courts. *See generally United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970); *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. 281, 296 (1970).

This Court has held on several occasions that the same standards for evaluating and remedying constitutional violations that apply on direct review do not apply on habeas review. In *United States v. Frady*, 456 U.S. 152, 164 (1982), a federal prisoner habeas case, the Court held that it would be inappropriate on collateral review to evaluate an alleged error that had not been raised at trial under the same standard that would be used on direct review. To do so would be to wrongly treat direct review and collateral review as interchangeable. A criminal defendant who has waived or exhausted his right to direct

appeal stands fairly and finally convicted. "Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks. To the contrary, the final judgment commands respect." *United States v. Frady*, 456 U.S. at 164–65.

It has long been the law that an error which would justify reversal on direct appeal will not necessarily provide a basis for relief on a collateral attack from a final judgment. *United States v. Frady*, 456 U.S. at 165.

Similarly, in *Teague v. Lane*, 489 U.S. 288, this Court drew upon Justice Harlan's views in prior cases to conclude that because collateral review is an avenue for upsetting an otherwise final and valid conviction, new constitutional rules of criminal procedure should not apply retroactively to cases on collateral review even though they apply retroactively on direct review. The Court held that habeas corpus is not intended to assure every individual a trial free of constitutional error, emphasizing that the interests of finality and federalism are vital in determining the proper scope of habeas corpus review. *Teague v. Lane*, 489 U.S. at 308. *See also Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., separate opinion).

The cost to the criminal justice system of undermining finality of judgments is a legitimate concern whose importance is not limited to the issue of retroactivity. Petitioner and amicus say that this factor is insignificant compared to what they perceive as an overriding need to have a federal court be the arbiter of all federal constitutional rights. But this Court has already rejected that notion. This Court has said that while there may have been reason to distrust the commitment of state court judges to federal constitutional rights at one time in our history, and although there are differences between state and federal institutions, state courts, like federal courts, are constitutionally obligated to safeguard personal

liberties and to uphold federal law, and there is no reason to believe they are incompetent, unwilling, or unable to do so. *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). This Court has also rejected the premise that every litigant is entitled to a federal forum on every possible constitutional claim. *Cf. Allen v. McCurry*, 449 U.S. 90 (1980).

Although this Court will not presume that the state courts are unwilling or unable to protect federal constitutional rights, it recognizes that federal habeas jurisdiction has a beneficial deterrent aspect. The Court has noted "'the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.'" *Teague v. Lane*, 489 U.S. at 306, quoting *Desist v. United States*, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting).

But this Court has held that any deterrent function the threat of habeas may be said to have is adequately served if the habeas court applies constitutional standards that prevailed when the original proceedings took place; new constitutional standards need not be applied on collateral review. *Teague v. Lane*, 489 U.S. at 306.

This deterrent theme also played a major part in this Court's decision in *Stone v. Powell*, 428 U.S. at 483, 486, where the Court held that the judicially created exclusionary rule is designed to effectuate the individual rights secured by the Fourth Amendment primarily by deterring future police misconduct. The Court also held, however, that this aim is adequately met by applying the exclusionary rule at the trial level and on direct review. *Stone v. Powell*, 428 U.S. at 492–93.

The Court concluded that even if applying and enforcing the exclusionary rule on collateral review might provide some additional deterrence, that benefit "would be

outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Stone v. Powell*, 428 U.S. at 494-95. Among these costs is the risk that due simply to the passage of time a criminal defendant, who is entitled only to a new trial, will actually go free because the state can no longer meet its burden of proof at a new trial. *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion). Moreover, there is no assurance that the result of the second trial will be any more accurate than the result of the first trial and the second trial itself presents an opportunity for new errors which may be as bad as, or worse than, those identified at the original trial. *Brecht v. Abrahamson*, J.A. at 121.

The concerns that explain the differences between direct review and collateral review also explain why the *Chapman* test that governs federal constitutional error in all courts on direct review should not apply on habeas review. To apply the same stringent harmless error standard on collateral review that is applied on direct review is to wrongly treat the two as interchangeable. It ignores the principle that an error which may warrant reversal on direct appeal may not warrant relief on collateral attack on a final judgment. *See Frady*, 456 U.S. at 165.

2. The remedial nature of the *Chapman* test and the nature of a *Doyle* violation counsel against applying *Chapman* on habeas review of a *Doyle* violation.

The *Chapman* harmless error rule, like the Fourth Amendment exclusionary rule, is, in essence, a remedial device designed to protect federal constitutional rights in criminal proceedings and to encourage state prosecutors, judges, and officers to fully respect and enforce those rights. In *Chapman*, which came before this Court on

direct review, the Court held that a state conviction need not be reversed on the ground of federal constitutional error if the reviewing court could find the error to be harmless beyond a reasonable doubt. The Court held that every federal constitutional error does not require automatic reversal of a conviction. Instead, it created a harmless error rule sufficient to redress those constitutional infringements that reasonably might have affected the proceedings that produced the conviction. Thus, the *Chapman* harmless error rule sounds in remedy. It is an alternative to the more drastic remedy of automatic reversal. It is not itself a constitutional right, but, like the exclusionary rule, is a device designed to protect constitutional rights.

In practice, the harmless error rule operates like the exclusionary rule. The harmless error rule encourages police, prosecutors, and trial judges to be mindful of constitutional rules by posing the risk that a conviction will be reversed and a new trial ordered unless the state can show that any constitutional error was harmless beyond a reasonable doubt.

The threat of losing a conviction is sufficient at the state court level to encourage adherence to constitutional rules and procedures. It is not reasonable to believe that police, prosecutors, and trial judges will be any more encouraged to obey the Constitution by the threat that even if the state appellate courts do not reverse a conviction due to federal constitutional error, a federal habeas court might do so. Nor is the *Chapman* test necessary at the federal habeas level to encourage state appellate judges to enforce the federal Constitution. There is no reason to believe that state appellate judges would deliberately disregard constitutional rules and procedures or deliberately misapply *Chapman* merely because they know that on habeas review, the federal court will not be applying *Chapman*.

The imbalance between the costs and benefits of applying *Chapman* on habeas review is particularly acute here because of the nature of a *Doyle* violation. *Doyle* prohibits a prosecutor from using a criminal defendant's *Miranda* silence to impeach his trial testimony because it is unfair for the state to breach the implied promise of the *Miranda* warnings assuring the suspect his silence will not be used against him. *Doyle*, 426 U.S. 619; *Greer v. Miller*, 483 U.S. at 763. Like the Fourth Amendment exclusionary rule, this limitation on what evidence the government can use applies regardless of the probative value of the evidence. *See Wainwright v. Greenfield*, 474 U.S. 284, 293 (1986); *see also Fletcher v. Weir*, 455 U.S. 603 (1982); *Jenkins v. Anderson*, 447 U.S. 231 (1980) (pre-arrest and pre-*Miranda* silence are admissible; it is the giving of the implied promise that is gravamen of error).

Post-*Miranda* silence may be consistent or inconsistent with a defendant's subsequent exculpatory trial testimony, depending on whether the silence means merely that the defendant was exercising his right to remain silent or whether the silence means he had not yet had time to concoct an exculpatory story. The probative value of a defendant's silence in a particular case is properly left to the jury. The uncertain probative value of silence as impeaching evidence does not prohibit its admission. Rather, the thrust of *Doyle* is that the government must "play straight with those it prosecutes." *Brecht v. Abrahamson*, J.A. at 113. Thus the *Doyle* rule does not directly relate to the defendant's guilt or innocence. Furthermore, the *Doyle* rule may be characterized as a prophylactic rule, a "buffer" around *Miranda*, which is itself a "buffer" around the self-incrimination clause. *Brecht v. Abrahamson*, J.A. at 117. Both the remedial nature of the *Chapman* test and the nature of a *Doyle*

violation counsel that *Chapman* should not be applied on habeas review of a *Doyle* violation.[6]

E. Neither Due Process Nor The Sixth Amendment Right To Jury Trial Mandates That *Chapman* Be Applied On Habeas Review.

Chapman provides the remedy of reversal of a criminal conviction whenever there is a reasonable possibility that federal constitutional error might have contributed to the conviction. *Chapman* requires reversal when, despite sufficient evidence for conviction that does not include the evidence tainted by constitutional error, an honest, fair

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[6]These theories are discussed more fully in the opinion of the Seventh Circuit Court of Appeals (J.A. 98) and in the amicus briefs. In addition, whether *Miranda* claims should be heard on habeas is pending before this Court in *Withrow v. Williams*, No. 91-1030. If this Court bars review of *Miranda* claims on habeas, that rule should be extended to a *Doyle* violation. The State will not reiterate that discussion here. This rationale provides additional support for the State's argument that *Chapman* should not be applied on habeas review of *Doyle* errors, but it is not crucial to the State's argument. The nature of collateral review, the concerns of federalism, the remedial nature of *Chapman*, and the core purpose of habeas corpus compel the conclusion that *Chapman* is not the proper test on habeas review regardless of the nature of the underlying error. In the next section of the brief, the State suggests alternative tests that should replace *Chapman* on habeas review. Those tests may well be applicable to violations other than *Doyle*, where other evidence or comments are unconstitutionally injected into the trial. However, in the case before it, this Court need only decide whether *Chapman* should be applied on habeas review of *Doyle* errors. It can leave to another day questions of whether *Chapman* should be applied on habeas review of other errors and, if not, what standard should be applied to those errors.

minded jury *might* have acquitted in the absence of the constitutional error. *Chapman*, 386 U.S. at 25-26.

The unarticulated value underlying the test formulated in *Chapman* appears to be the right of a criminal defendant to have a jury, not a reviewing court, decide his guilt or innocence.[7] *Chapman* accommodates the notion that even though the evidence is sufficient to establish guilt beyond a reasonable doubt, the jury retains its historical prerogative of not finding guilt.

The *Chapman* test attempts to determine what influenced the jury by realistically evaluating the nature of the error in the context of a specific case. It culls out the erroneous material to see if the error is so insignificant in light of the entire case or the remaining evidence is so overwhelming that we can safely say the error played no part in the jury's decision and the defendant received the full benefit of his trial by jury.[8]

Realistically, any test of harmless error short of automatic reversal will infringe to some extent on the right to have the jury alone determine guilt or innocence because one can never know with absolute certainty if the erroneous material played a part in the jury's verdict.[9]

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[7]*Chapman* could not have rested explicitly on the Sixth Amendment right to jury trial because it had not yet been held applicable to the states. *See Duncan v. Louisiana*, 391 U.S. 145 (1968).

[8]Contrary to the district court's apparent perception in this case, J.A. at 92-93, overwhelming evidence of guilt is not a prerequisite to a finding of harmless error under *Chapman*, although the *Chapman* test can be met by such a showing. *See Fencl v. Abrahamson*, 841 F.2d 760, 768-69 (7th Cir. 1988).

[9]Brecht's position is not clear. He argues that *Chapman* should apply on habeas review. He seeks reinstatement of the district court's order which granted relief because the untainted

While the *Chapman* test attempts to accommodate the goal of having the jury determine guilt or innocence, that goal is not paramount to all else. Many other aspects of the criminal jury system, which have long been accepted, demonstrate that a preference to have the jury alone decide the facts cannot be absolute if the criminal justice system is to function.

For example, the trial judge decides whether to admit a confession or eyewitness identification at trial even though that decision often depends on assessing the credibility of the witnesses, and even though a decision to admit the evidence may well be dispositive of the verdict at trial. Yet

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evidence was not overwhelming. Thus, he implicitly accepts the overwhelming evidence formulation of the *Chapman* test. But at the same time, he argues that the right to have the jury determine guilt or innocence is crucial and that no reviewing court in hindsight can determine what impact a given error had on any juror. He does not indicate how applying *Chapman* on habeas would obviate these problems. And he cites as authority commentators who have favored the automatic reversal rule over the *Chapman* test because they believe *Chapman*, especially the overwhelming evidence formulation of *Chapman*, permits the reviewing court to usurp the function of the jury. *See* Teitelbaum, Sutton-Barbere and Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 Wis. L. Rev. 1147; Field, *Assessing the Harmlessness of Federal Constitutional Error--A Process in Need of a Rationale*, 125 U. of Pa. L. Rev. 15 (1976). Yet, he has never argued that *Chapman* should be rejected and replaced with an automatic reversal rule. Perhaps his point is that since, in his view, if even *Chapman* infringes on the jury function, any lesser test surely will. But that point is not well taken, as the State will demonstrate. Moreover, *Bushell's Case*, on which he relies so heavily, sheds little light on the question presented in this case. It dealt with jurors who were imprisoned for returning a disfavored verdict. It did not speak to the harmless error question.

it has never been held that a defendant has a right to have a jury make this initial credibility determination.

Similarly, barring an influx of extraneous, prejudicial information or outside influence, a jury verdict cannot be impeached on the basis of what occurred during deliberations. This is true even though an impropriety during deliberations might have influenced the verdict and arguably has deprived the defendant of his right to have a jury determine his guilt or innocence based solely on the evidence at trial. The law has long recognized that preserving the privacy of jury deliberations must outweigh an expansive view of the right to a jury trial uninfluenced by any error. *See generally* 3 J. Weinstein & M. Berger, *Weinstein's Evidence*, sec. 606[04] (1992); Fed. R. Evid. 606(b).

Recognition that the *Chapman* test of harmless error seeks to accommodate the goal of trial by jury does not mean that the same test must carry over to habeas review, where other goals assume importance.

The State fully agrees that a stringent test of harmless error for federal constitutional errors is warranted on direct review. Requiring the state reviewing courts and this Court to find constitutional error harmless beyond a reasonable doubt on direct review ensures that individual constitutional rights will be fully respected by state courts and officers. Moreover, by making the *Chapman* test an aspect of direct review of state court convictions, this Court is better able to instruct the state courts on what they must do to protect constitutional rights and it guarantees a uniform method of protecting constitutional rights throughout the nation. Applying the *Chapman* test on direct review fully implements the goal of having the jury reach a decision on the basis of a proper record.

But any additional protection of this goal to be gained by applying the *Chapman* test on habeas review would be minimal, while the costs would most certainly be great.

F. Application Of The *Chapman* Test On Habeas Review Of *Doyle* Violations Is Inconsistent With Congress's Express Policy To Limit Habeas Relief To Only Those State Prisoners In Custody In Violation Of The Constitution.

The State fully agrees that in order for habeas corpus to serve as the guardian of federal constitutional rights contemplated by the habeas statutes, *see Reed v. Ross*, 468 U.S. 1, 10 (1984), a state prisoner must be afforded plenary federal review of the merits of his federal constitutional claim.[10] The federal court does not do the job that Congress has assigned it if it conducts only cursory or deferential review of the threshold question of whether a federal constitutional error occurred in the state criminal proceedings. *See Brown v. Allen*, 344 U.S. at 500-02; *Wright v. West*, 112 S. Ct. 2482, 2495 (1992) (O'Connor, J., concurring).

This does not mean, however, that once the habeas court decides that federal constitutional error occurred, the state prisoner is entitled to the same relief he would have received on direct review in state court. It trivializes the great writ and endangers the delicate balance inherent in

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[10]The language in *Reed* was quoted from *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). But the language quoted from *Mitchum* addressed not § 2254 habeas actions, but § 1983 civil rights actions. In § 1983 actions, unlike § 2254 actions, a state court judgment on the merits of the federal constitutional claim is *res judicata* and the claim cannot be litigated anew in the federal court. *See Allen v. McCurry*, 449 U.S. 90 (1980).

our federal system to turn habeas corpus into simply a rerun of the state appellate process.

More fundamentally still, the question on direct review and the question on habeas review are not the same. The question on direct review is whether the state has proven the constitutional error harmless beyond a reasonable doubt. The question on habeas review is whether the state prisoner is "in custody in violation of the Constitution" of the United States. 28 U.S.C. § 2254(a). Every restraint of liberty pursuant to state criminal proceedings in which a "harmful" federal constitutional error occurred under *Chapman* does not constitute restraint in violation of the Constitution warranting habeas relief.[11] The question on habeas is whether the state prisoner must be released from custody because, despite a final and presumptively valid state conviction, the federal court is convinced that there has been such an extreme malfunction of the state criminal justice system as to render the prisoner's custody "constitutionally intolerable." *Fay v. Noia*, 372 U.S. at 414; *Jackson v. Virginia*, 443 U.S. at 332 n.5 (Stevens, J. concurring).

In conclusion, the nature and core purpose of habeas review, the imperative of federalism, the purpose of the harmless error rule, and the nature of a *Doyle* violation all make it inappropriate to apply the *Chapman* beyond a

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[11]In *Rose v. Lundy*, 455 U.S. 509, 543 n.8 (1982), Justice Stevens notes that the principle that new rules need not apply retroactively on collateral review implicitly acknowledges that there is a class of "harmful" constitutional error that nonetheless does not render the criminal proceeding so fundamentally unfair as to require habeas relief: "In ruling that a constitutional principle is not to be applied retroactively, the Court implicitly suggests that the right is not necessary to ensure the integrity of the underlying judgment; the Court certainly would not allow claims of such magnitude to remain unremedied."

reasonable doubt test for harmless error on habeas review of a *Doyle* violation.

II. HABEAS RELIEF SHOULD BE GRANTED ONLY WHERE THE COURT DETERMINES THERE IS NO CONSTITUTIONALLY VALID BASIS FOR THE STATE CUSTODY.

If this Court agrees with the State that the *Chapman* harmless error rule should not apply to a *Doyle* violation on habeas review, it must then determine what approach should be adopted.

As one option, the Court could require the state to prove the constitutional error harmless, but impose a burden less onerous than the *Chapman* beyond a reasonable doubt standard. The Court could, as the Seventh Circuit Court of Appeals did in this case, adopt the harmless error standard stated in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), and *United States v. Lane*, 474 U.S. 438, 449 (1986). This test provides that "only an error that exerts substantial influence on the course of the trial and produces actual prejudice to the accused vitiates the judgment." *Brecht v. Abrahamson*, J.A. at 116. This test is familiar to federal courts. Like *Chapman*, it looks at the potential influence of the error on the verdict and thus protects the goal of having the jury decide the question of guilt or innocence on the basis of a proper record. At the same time, it is more consistent with the nature and purpose of habeas review than the stringent *Chapman* test. The *Kotteakos/Lane* standard is sufficient to provide relief to a prisoner who has been genuinely prejudiced by constitutional error occurring at his state court proceedings.

As an alternative, equally sufficient standard, the State proposes a test which incorporates the *Jackson v. Virginia*

sufficiency of the evidence standard as the measure for whether a constitutional error has resulted in the state prisoner being in custody in violation of the Constitution within the meaning of the habeas statute. Under this proposal, the habeas court would first determine *de novo* whether federal constitutional error occurred. If it found such error, it would then review the untainted evidence to determine whether it is sufficient to support the verdict of guilt under the *Jackson v. Virginia* standard. Under *Jackson v. Virginia*, the conviction must be upheld if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319.

This proposal could be criticized as ignoring the prospect that the jury verdict might have been influenced by the error, despite a conclusion that the untainted evidence was sufficient to sustain the conviction. But that criticism is not well founded. Despite its creation of the *Chapman* test for harmless error, this Court has never held that a criminal defendant has a constitutional right to a jury verdict totally uninfluenced by trial error. On direct review the *Chapman* test properly focuses on whether there is a reasonable possibility the error contributed to the conviction, not on what might have been the case absent the error. This focus is appropriate on direct review, where the stringent *Chapman* standard serves a protective, educative, and deterrent function.

But on habeas review, the question is not whether there was trial error that should be remedied. The question is not whether, although the guilty verdict is sustainable on untainted evidence, there nonetheless is a reasonable possibility that a trial error might have influenced it. Rather, the distinctly different question is whether the person is in custody in violation of the Constitution.

The question is not whether "harmful" constitutional error as defined in *Chapman* was committed. The question is whether the entire state criminal proceeding was so fundamentally defective that the resulting custody is constitutionally intolerable. *Fay v. Noia*, 372 U.S. at 414. The question is whether the federal court can say that the custody is the result of "an extreme malfunction" in the state criminal justice system. *Jackson v. Virginia*, 443 U.S. at 332 n.5 (Stevens, J. concurring). The question is whether "an innocent person suffers an unconstitutional loss of liberty." *Stone v. Powell*, 428 U.S. at 491 n.31. The question is whether the prisoner is one "whom society has grievously wronged." *Fay v. Noia*, 372 U.S. at 441. The question is whether the prisoner is in custody "'for a matter for which by law no man ought to be punished'" or whether there is no "'reasonable ground'" for his imprisonment. *Fay v. Noia*, 372 U.S. at 405. The ultimate question, embodied in each of these formulations, is whether the person is in custody in violation of the Constitution within the meaning of the habeas statute.

Surely if the record evidence at trial, excluding the constitutionally tainted material, is sufficient to have enabled a rational jury to find the essential elements of the offense beyond a reasonable doubt, it cannot be said that the person is in custody in violation of the Constitution. Where there is untainted evidence sufficient to prove guilt beyond a reasonable doubt, how can it be said that the entire criminal proceeding was so fundamentally defective that the resulting custody is constitutionally intolerable? How can it be said that there was an extreme malfunction in the state criminal justice system? How can it be said that the procedure created an impermissibly large risk that the innocent will be convicted? How can it be said that an innocent person is suffering an unconstitutional loss of liberty? How can it be said that the person is one whom society has grievously wronged? How can it be said that the person is in custody for a matter for which by law no man ought to be punished, or that there is no reasonable

ground for the imprisonment? It cannot be so said. Where there is a constitutionally valid basis for the custody because the state has produced sufficient untainted evidence to support the verdict of guilt beyond a reasonable doubt, it cannot be said that the state prisoner is in custody in violation of the Constitution.

Under the State's proposal, the habeas court will review the allegation of a *Doyle* violation *de novo* to determine if constitutional error was committed. If it finds no constitutional error, it will, of course, deny relief. If it finds such error, it must nonetheless deny relief if the untainted evidence is sufficient under *Jackson v. Virginia* to support the verdict. This test for whether relief is warranted applies whether or not the state court found federal constitutional error.

As an added protection, to assure that the prisoner received the full benefit of *Chapman* guaranteed to him on direct review, if the state court found error but found it harmless under *Chapman*, the habeas court should also review that determination to make sure that *Chapman* was not applied arbitrarily or unreasonably, "manifesting a purpose to defeat federal constitutional rights." *Chapman*, 386 U.S. at 56 (Harlan, J. dissenting). Only if the federal court so found could it grant relief, even though the untainted evidence is sufficient under *Jackson v. Virginia*.[12]

This proposal is adequate to protect those state prisoners who have been grievously wronged, which is the

[12]The State does not ask the Court to fully adopt Justice Harlan's approach in his *Chapman* dissent, which would have limited review to whether the harmless error test used by the State was consistent with due process and, if so, whether it was nonetheless arbitrarily applied in the particular case. Protection of constitutional rights is best afforded by continuing to apply the *Chapman* test on direct review.

core purpose of habeas, for if the untainted evidence is insufficient to support the conviction, relief will be granted. Thus, the state will be penalized for proving its case by unconstitutional means. The risk that the error will not be found harmless beyond a reasonable doubt on direct review, and the risk that the remaining evidence will not be found sufficient by the federal court, should adequately deter prosecutors and state officers from committing serious errors. This proposal is adequate to make sure that state courts "'toe the constitutional mark,'" *Teague v. Lane*, 489 U.S. at 306–07, and authority cited therein, because the habeas court will reject a state court finding of harmless error if it is evident the state court had a purpose to defeat constitutional rights.

Adoption of either the *Kotteakos/Lane* harmless error standard or the *Jackson v. Virginia*/Harlan proposal would adequately accommodate the concerns of federalism intrinsic to our Constitution, the goal of finality necessary to effective enforcement of the criminal law and the protection of the federal constitutional rights of individual citizens essential to our free society. Adoption of the State's proposal would confine the writ of habeas corpus to its proper and crucial role as the federal safeguard against state criminal proceedings that are so fundamentally defective that the resulting custody is constitutionally intolerable because the state has no valid basis for it.

III. A *DOYLE* VIOLATION DOES NOT WARRANT HABEAS RELIEF UNLESS IT MADE THE TRIAL SO FUNDAMENTALLY UNFAIR AS TO DENY DUE PROCESS.

In the alternative, the State argues that a *Doyle* violation is not a constitutional violation at all, and thus does not warrant habeas relief, unless the habeas petitioner demonstrates that it made the trial so fundamentally unfair as to deny him due process.

In *Doyle*, this Court held that a prosecutor's use of a criminal defendant's post-*Miranda* silence to impeach his trial testimony violates the Due Process Clause of the Fourteenth Amendment because it is fundamentally unfair to allow the state to breach the implied assurance contained in *Miranda* warnings. *Doyle*, 426 U.S. at 618-19; *Wainwright v. Greenfield*, 474 U.S. at 293. *Doyle* came before the Court on direct review and the Court reversed the conviction because the state did not argue harmless error. *Doyle*, 426 U.S. at 619-20.

In *Wainwright v. Greenfield*, this Court affirmed the federal circuit court's grant of a writ of habeas corpus. In a concurrence, then-Justice Rehnquist noted that only a small portion of the prosecutor's closing argument was constitutionally objectionable and that the testimony upon which the argument was based had already come in without objection and therefore was before the jury for its consideration regardless of the prosecutor's summation. *Wainwright v. Greenfield*, 474 U.S. at 301 (Rehnquist, J., concurring). Justice Rehnquist suggested, therefore, that "[t]his fact, together with the brevity of the prosecutor's improper comment, at least suggests that the error was harmless beyond a reasonable doubt." *Id.*, citing *Cupp v. Naughten*, 414 U.S. 141 (1973); and *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). However, because the state did not contest the Court of Appeals' conclusion that any error was not harmless, Justice Rehnquist agreed the judgment should be affirmed. *Id.*

In neither *Doyle* nor *Wainwright v. Greenfield* did the parties brief the question of what standard should be used to determine when a *Doyle* violation warrants reversal of an otherwise valid conviction. In *Greer v. Miller*, the question was briefed and argued but the Court never reached it because it held no *Doyle* violation had occurred. Nonetheless, in a concurring opinion, Justice Stevens did propose that in typical habeas cases:

> *Doyle* errors are not so fundamentally unfair that convictions must be reversed whenever the State cannot bear the heavy burden of proving that the error was harmless beyond a reasonable doubt.

Greer v. Miller, 483 U.S. at 767. Justice Stevens restated the view he had expressed in an earlier opinion, that only those constitutional "errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained" warrant relief on habeas review of an otherwise final and valid state judgment. *Id.*, quoting *Rose v. Lundy*, 455 U.S. at 543-44 (Stevens, J., dissenting).

This approach is particularly appropriate for *Doyle* violations. *Doyle* restricts the means by which a prosecutor may attack the defendant's credibility. The prosecutor may ask about and comment on pre-arrest silence or post-arrest, pre-*Miranda* silence, but he may not ask about or comment on post-*Miranda* silence. This is similar to other line-drawing that limits the prosecutor. For example, the prosecutor can argue to the jury that the evidence shows beyond a reasonable doubt that the defendant intended to kill, but he cannot argue that *he believes* the evidence shows intent to kill beyond a reasonable doubt.

The rules governing prosecutorial conduct necessarily draw thin lines which, not surprisingly, are sometimes crossed. For example, in this case, it was perfectly proper for the prosecutor to impeach Brecht's "accident" testimony at trial both by questions and comments about his failure to seek aid for the victim or to call for help. It was proper for the prosecutor to address evidence that instead of seeking help, Brecht immediately stole the victim's car and drove away; that he lied about his situation to the police officer who came to his aid after he had wrecked the car in a ditch; and that he failed to tell the officer or the man who gave him a ride that there had just been a terrible accident in which his brother-in-law was shot. This

evidence of Brecht's conduct occurred prior to his arrest and prior to *Miranda* warnings. Similarly, it was perfectly proper for the prosecutor to impeach Brecht's "accident" testimony at trial by questions about and comments on his failure to tell the arresting officers that the shooting occurred because the gun went off when he tripped. While this silence was after his arrest, it was prior to *Miranda* warnings. *Doyle* only prohibited the prosecutor in this case from referring to the fact that Brecht remained silent after his initial appearance, when he first received *Miranda* warnings.

In fact, the *Doyle* violation consisted of no more than the fact that in phrasing his impeachment questions and comments, the prosecutor misspoke or was slightly careless and used language which was arguably broad enough to encompass impermissible references to Brecht's post-*Miranda* silence as well as permissible references to his pre-*Miranda* silence.

Thus, a *Doyle* violation is similar to other instances of prosecutorial misconduct where a prosecutor's choice of words may cause him to cross a thin line. Recognizing that in the heat of battle counsel may overstep the rules, that due process is an amorphous concept, and that a prosecutor's conduct is often a response to the tactics of defense counsel, this Court has required the petitioner to make a significant showing before habeas relief is warranted for this type of prosecutorial misconduct at trial. *See United States v. Young*, 470 U.S. 1 (1985); *Donnelly v. DeChristoforo*, 416 U.S. at 646-47. It is not enough that the prosecutor's comments "undoubtedly were improper" or even that they deserve condemnation; the question is whether the comments rendered the trial fundamentally unfair. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Donnelly v. DeChristoforo*, 416 U.S. at 643. The petitioner must show that the prosecutor's misconduct "by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v.*

DeChristoforo, 416 U.S. at 643; *Darden v. Wainwright*, 477 U.S. at 181. In essence this is the standard proffered by Justice Stevens in *Greer* to assess whether a *Doyle* violation warrants relief on habeas review.

Because a *Doyle* violation is really a form of prosecutorial misconduct, no worse than any other prosecutorial impropriety at trial, it should be treated the same way on habeas review. Therefore, a *Doyle* violation should not warrant relief unless the habeas court concludes that by itself it so infected the entire trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. at 643.

The cases of *Donnelly v. DeChristoforo*, *Darden v. Wainwright* and *Cupp v. Naughten* are not perfect analogies because the Court, in these cases, held that the error did not rise to the level of a constitutional violation at all--that is, there was no due process violation unless the error by itself so infected the entire trial as to make the resulting conviction a denial of due process. In *Doyle*, on the other hand, the Court held that it is a due process violation for a prosecutor to impeach a defendant's trial testimony with his post-*Miranda* silence. Thus, to equate a *Doyle* violation with other forms of improper prosecutorial argument, this Court apparently would need to modify its language in *Doyle*. The State asks this Court to hold that a *Doyle* error constitutes a denial of due process warranting habeas relief only if, by itself, it so infects the entire trial with unfairness that the resulting conviction violates due process. *See generally United States ex rel. Miller v. Greer*, 789 F.2d 438, 455 (7th Cir. 1986) (Easterbrook, C.J., dissenting). This approach not only warns prosecutors to follow *Doyle* strictly, but it ensures that an unduly high price is not paid for a prosecutor's slip of the tongue.

The prior due process cases do not explain what the habeas petitioner must show to demonstrate that a trial

error so infected the entire trial as to make the resulting conviction a denial of due process. However, in several contexts the Court has emphasized that the central purpose of a criminal trial is to decide the factual question of guilt or innocence. *Rose v. Clark*, 478 U.S. 570 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). The Court has indicated that the measure of a fair trial is whether it is one which can be relied upon as having produced a reliable result. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984), and authority cited therein. This requires the petitioner to show a reasonable probability that, but for the error, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

It would be consistent, then, for this Court to clarify the cases of prosecutorial misconduct (including *Doyle* violations) to mean that a petitioner cannot show a denial of due process (and thus cannot show a constitutional violation) unless he shows a reasonable probability that, but for the error, the result of the proceeding would have been different.

The primary rationale of *Strickland*, which makes it applicable to prosecutorial misconduct cases, is that the core purpose of a fair trial, indeed, the core purpose of due process in criminal proceedings, is to ensure that the adversarial proceeding produces a just and reliable result, one in which there can be confidence. *See Strickland*, 466 U.S. at 686–87, 694.

This rationale fully applies to habeas review, whose core purpose is to "assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Desist v. United States*, 394 U.S. at 262 (Harlan, J. dissenting), *quoted with approval in Teague v. Lane*, 489 U.S. at 312. If the habeas petitioner cannot show a reasonable probability that, but

for the error, the result of the proceeding would have been different, then it cannot be said that the result of the trial was unreliable, that the trial was unfair, that the resulting conviction is a denial of due process, or that there is an impermissibly large risk an innocent man was convicted.[13]

Moreover, the *Strickland* approach is one with which federal courts are intimately familiar and can readily apply. Indeed, there is a nice symmetry in measuring the errors of both prosecutors and defense counsel by the same test. Putting the burden of proof on the petitioner is consistent with the principle that the habeas petitioner has the burden of proving the facts underlying his claim for relief. *See generally Sumner v. Mata*, 449 U.S. 539 (1981). The petitioner already has the burden to prove his own defense counsel's performance denied him the paramount and fundamental right to effective assistance of counsel. It is surely no less legitimate to put the burden on him to prove that the performance of the prosecutor denied him his due process right to a fair trial. This approach is flexible and well suited for measuring prosecutorial errors, which, like errors of defense counsel, can arise in innumerable contexts. *See Strickland*, 466 U.S. at 689.

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[13]In *Strickland*, this Court held because an ineffective assistance claim is an attack on the fundamental fairness of the proceeding and since fundamental fairness is the central concern of the writ of habeas corpus, no special standards should apply to such claims on habeas. *Strickland*, 466 U.S. at 697. If this Court adopts *Strickland* as the standard for *Doyle* violations on habeas, it need not now decide whether the *Strickland* standard should also be applied on direct review.

Arguably, at least on habeas review, the *Strickland* standard could also be converted from a standard that determines whether there was a constitutional violation to a standard for determining whether relief is warranted for the constitutional violation.

Accordingly, this Court should hold that a *Doyle* error warrants habeas relief only if the petitioner shows that, by itself, the error so infected the entire trial with unfairness that the resulting conviction amounts to a denial of due process. To meet this burden, the petitioner must show a reasonable probability that, but for the error, the result of the proceeding would have been different.[14] Absent this showing, the habeas petitioner is not entitled to relief.[15]

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[14]This raises the question of the relationship between the *Strickland* prejudice test and the prejudice a defaulting petitioner is required to show. In *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992), the Court appeared to equate the prejudice prong of the "cause and prejudice" requirement of a defaulted or successive claim with the prejudice showing required in *Strickland*. If this Court adopts *Strickland* as the test for habeas review of a *Doyle* violation, the defaulting petitioner and the non-defaulting petitioner would still be treated differently because the defaulting petitioner would also have to show cause for his default. Under the *Jackson v. Virginia* proposal, the defaulting petitioner who shows cause might get his *Doyle* claim heard by establishing prejudice under *Strickland*, but he would not get relief unless the remaining untainted evidence was insufficient to support the verdict. If a petitioner shows prejudice under *Strickland*, as a prerequisite to either relief or review, the state probably could not show the error was harmless under either the *Chapman* or *Kotteakos/Lane* test. Finally, the miscarriage of justice or actual innocence standard articulated in *Sawyer v. Whitley* for a petitioner who cannot show "cause" is so high that if a petitioner meets it, it appears none of the standards suggested would enable the state to defeat his claim for habeas relief.

[15]In this case, under any of the standards proposed and even if this Court holds *Chapman* applies, for all the reasons argued in the courts below and found by the Wisconsin Supreme Court, Brecht is not entitled to relief and the judgment should be affirmed. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

CONCLUSION

For the above reasons, the judgment of the Seventh Circuit Court of Appeals should be affirmed.

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In The

Supreme Court of the United States

October Term, 1992

TODD A. BRECHT,

Petitioner,

v.

GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

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Question Presented

Whether, when considering violations of *Doyle v. Ohio* in federal habeas corpus proceedings, it is consistent with constitutional due process and the Sixth Amendment right to trial by jury to abandon the standard of review of whether constitutional error was harmless beyond a reasonable doubt and substitute the standard of whether the error substantially affected the course of the trial.

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STATEMENT OF THE CASE – A REPLY

"In this case the only contested issue is whether the death resulted from an intent to kill or a tragic accident." Pet. Br. 5. The dispute is about innocence not acts. Do tainted jury determinations of intent comport with due process? Mr. Brecht continues to maintain that he is innocent of murder and challenges the accuracy of his guilt determination.[1]

The theory of the State of Wisconsin is that a little poison may be all right, but too much will kill and therefore they should be allowed to use a restrained quantity of it and let them be the judge of what quantity they use. The Fifth Amendment does not state that testimony obtained by means of compelled self-incrimination or by the failure of the defendant to incriminate himself may be used and then dispensed with at the whim or will of the prosecution or the trial judge.

The Solicitor General asserts *Doyle* violations concern "nothing more than the admission of truthful evidence regarding the defendant's silence." (Br. p. 17) That displays fundamental confusion about the issue at bar: *Stone v. Powell* was not about truthful testimony regarding illegally seized physical evidence; *Stone* was about admission of the physical evidence, itself. This case is about poisoning a trial by references to post *Miranda* silence. The silence and the use of that silence is at issue; truthful testimony about silence is *not* the issue. "Truthful silence" and "untruthful silence" are grotesque concepts. The use of such silence lies at the core of the Fifth Amendment

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[1] Relevant jury instructions are at Jt. App. 24-28.

bar on compelling a person to be a witness against himself.[2]

The statement of the case of the State of Wisconsin's brief and the statement of the Solicitor General's brief obscure this single contested issue. Moreover, each brief in its "statement" slants the factual presentation, including subtle error of fact in this Solicitor General's brief.[3] Each brief confuses testimony,[4] argues

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[2] Statements are different from silence. Grano's discussion of "prophylactic" rules doesn't mention the use of silence in his treatment of *Miranda* issues for a very good reason. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Northwestern L.Rev. 100, 106-114 (1985). By Grano's definition of prophylactic, the possibility of violating the rule without violating the constitution, no rule about the use of silence can ever be prophylactic. Since prosecutorial use of silence compels speech, whatever questions might lie about Miranda's prophylactic nature or constitutional basis do not arise in the instant case. The relevance of the *Miranda* warning is the formal notice to a person that silence is his right. The core of the Fifth Amendment guarantee against self incrimination is the right to remain silent. Any claim that this court's construction of the word "compelled" in the Fifth Amendment is not "doing constitutional law" borders on the frivolous.

[3] "[F]ound a rifle in their gun cabinet." Solicitor General's brief, p. 1, Jt. App. 99. The rifle is not from a gun cabinet – it was from the bedroom closet of the room in which Todd Brecht slept. Jt. App. 139, para. #3.

[4] "Because petitioner had taken the receiver off the upstairs telephone off the hook, the downstairs telephone was inoperable." Solicitor General's brief p. 1. This confuses which telephone was off the hook. Moreover, the cause of the *downstairs* telephone in the Hartman master bedroom being off the hook (Jt. App. 140, para. 9) was disputed at trial and could have been caused by Roger himself immediately after the shooting.

inferences,[5] and omits significant facts and testimony.[6] Each such misstatement and inference tends to increase

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[5] For an example of an instance of translating a possible inference into a factual conclusion while implying a witness made statements never made: "horizontal to slightly downward trajectory, a path inconsistent with a claim the weapon had discharged while petitioner was falling." Solicitor General's brief p. 3.

The coroner, Dr. Belau, made no "path inconsistency" remark, although the prosecutor did argue it. Tr. 812. The basis of this argument was an experiment conducted after the preliminary hearing on Dr. Belau's body employing a magic marker, yardstick and carpenter's level. (Tr. 554) The yardstick was lined up with marks made on Dr. Belau's own body and the carpenter's bubble read as "a little bit off." Dr. Belau's conceded possible problems with the experiment both with posture (Tr. 554) and uncertainty in determining the exit wound. (Tr. 552)

[6] For example:

A) The rifle was found outside the house, "suggesting that petitioner had tried to fire another shot." Solicitor General's brief p. 4. This omits Todd Brecht's testimony he attempted to shoot himself, but couldn't get the gun reloaded and threw it down. (See Wisconsin brief at p. 6)

The suggestion is also that Todd Brecht attempted to shoot Roger Hartman again, a suggestion made for the first time only in the prosecutor's final closing argument (Tr. 882-883), although given prominence by the Seventh Circuit opinion. Jt. App. 100. The defense could do little about this belated argument except object, which it did. (Tr. 883) The defense could not discuss the argument's conflict with Roger Hartman's statement he sneaked out of the house, nor its bizarre relationship with the prosecution's elaborate conjectures on premeditation and motive.

B) "The prosecution offered a motive for the killing: petitioner's hostility to Hartman because of the latter's objection to petitioner's homosexuality." Solicitor General brief, p. 4.

The prosecution had clearly represented prior to trial that it would prove through Molly Hartman that her husband's nega-

the likelihood of wrongful intent. These slanted statements present the evidence as if the standard of review

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tive attitude towards homosexuality had been communicated to Todd Brecht. (Tr. 71-72) No such testimony was forthcoming, quite the opposite. See Tr. 419-421. Molly Hartman also testified that Roger did not condemn or put down Todd, (Tr. 421) there were no arguments, (Tr. 422) it was a good relationship. (Tr. 422) She also testified she knew of no reason Todd Brecht would have wanted to hurt her husband. (Tr. 422)

C) A recitation of statements by Roger Hartman to neighbors appears at p. 4, Wisconsin brief but the recitation omits the contemporaneous statement by Roger Hartman that he didn't know if Todd Brecht had anything against him. (Tr. 164, 175, Pet. Brief 42)

D) "[T]he prosecutor impeached this testimony with letters Brecht had written, with homosexual overtones, to a jail inmate friend in Georgia. . . . " Wisconsin brief p. 7. The first of these two letters was never mailed, Tr. (626-27) the second letter never completed, and consisted of, "Dear Darrell, well here we are" and a date. (Tr. 628-29) The homosexual overtones in the other letter are far from obvious. (Tr. 621-22)

E) Officer Polus testified Brecht said the night he was arrested: "that he didn't mean to shoot anybody and he didn't mean to kill anybody, and later he said he didn't mean for anybody to get murdered." (Tr. 727) (Wisconsin Brief p. 7-8)

In his initial closing argument the prosecutor stated, "Now he was then taken into Winona and they then find the 14 rounds of ammunition on him, and Officer Polus says he hears him talking on the phone to his step father (sic), 'it was a mistake, it was an accident, I didn't murder anyone.' Why murder – a Freudian slip." (Tr. 817) The lengthy quote from Tr 873, at Wisconsin brief p. 8, responds to this argument, and was immediately preceded by, "Did they give Miranda and say Mr. Brecht would you like to make a statement, no they just gave it to him and they left." The quote's last sentence is incomplete (and lacks ellipsis) for it ends: " . . . and I would say, 'I didn't murder anybody,' but that's what it says on the paper that he got: murder." The defense attorney referent for "I would say" was to

rejected by this court in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 487-88 (1951) were the appropriate standard: it is not, nor can it be so long as questions of innocence remains at the core of habeas.[7]

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what he would say to the stepfather. The Prosecutor's referent for "I know what I would say" is what he would say to the police.

F) "It was also a condition of Brecht's probation that he was not to . . . leave the state without permission." Wisconsin Br. p. 4. "This suggested Brecht's real plan was to leave Wisconsin in violation of his probation. . . . " Wisconsin Br. p. 7. "It's questionable whether the record supports the proposition that petitioner wanted to leave Wisconsin." District Court opinion, Jt. App. 93.

[7] Wisconsin requests for the first time in its brief to this court application of the standard from *Jackson v. Virginia* 443 U.S. 307 (1979) (Wisconsin Br. 37) a standard developed to evaluate a jury determination untainted by error affecting the deliberative process. It is hard to conceive of a standard more violative of fundamental due process, but by not raising the argument earlier, Wisconsin has waived it. Wisconsin similarly requests application of *Strickland v. Washington* 466 U.S. 668 (1984). Unlike *Jackson* which cannot have been incorporated by reference in the single mention of scope of review below, a footnote on page 30 of Wisconsin's brief to the Seventh Circuit, *Strickland* might be considered as so incorporated, even if awkwardly so. However, as stated in Petitioner's Br. p. 40, none of the policy reasons underlying a standard for testing ineffective assistance of defense attorneys make any sense when the prosecutor inserts error into the trial, for the government is responsible for and can prevent such error. 466 U.S. 693. The heavy burden placed upon habeas petitioners (as well as on direct appeal) by *Strickland* is but one of many examples of how existent rules of law belie arguments that habeas is a rerun of appeal.

The close balance of evidence on the whole record is one obvious reason each court has reversed the preceding judgment, and presumably the reason that the Seventh Circuit found it necessary to change the standard of review.[8] Prosecution misstatements of fact before the jury may ordinarily constitute categorical "harmless error"[9] reflecting only vigorous representation, but such statements on appeal disserve both the function of the appeal process and the grant of certiorari in this case.

The Limited Grant of Certiorari: What Isn't at Issue

The certiorari grant in this case was limited to one question presented, but has become three different ones in the Brief for Wisconsin, changed in substance by the Solicitor General's amicus brief, changed to completely different issues by other amici, (Criminal Justice Legal Foundation, and County of Wayne) and supplemented by yet another question by amici California et al. The issues

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[8] Only by speculation can one determine the basis of Judge Cudahy's concurrence below, i.e. whether Judge Cudahy concurred by applying the new standard he objected to or by applying the old standard (J.App.128-130), contrary to the Solicitor General's Brief, p. 7, n.3. The district court correctly stated and applied existent harmless error law, Jt. App. 91-92, finding, "the state's references to petitioner's post-*Miranda* silence . . . crucial." "The sole issue for the jury was whether the shooting was accidental or intentional. With the defense hinging on petitioner's credibility, the state's remarks that he simply concocted a 'crazy story' at the time of trial may have been determinative." (Jt. App. 92)

[9] Checked by a combination of the caution that the attorneys' remarks are not evidence (Tr. 775) and the jury's exposure to *all* the evidence.

of whether *Chapman* should be overturned for cases on direct appeal, or whether violations of so-alled "prophylactic" rules invoke article III concerns, were never raised by the State of Wisconsin below, and thus were waived.[10] Neither is presented by the case at bar, which is on collateral review and involves a non-prophylactic rule. Moreover, both issues are barred from consideration by Supreme Court Rule 14.1(a) because neither was raised nor fairly included in the Petition for Certiorari. The attempted presentation of a *Stone v. Powell*, 428 U.S. 465 (1976), question by amici California et al while not as extravagant a claim on the grant of certiorari, is also barred by Supreme Court Rule 14.1(a), and certainly was neither the basis of the opinion for the Seventh Circuit (although mentioned, see Jt. App. 116-19), nor explicitly raised by Wisconsin below (indeed, declined at Wisconsin Brief p. 31, n.6), hence waived as well. Should this court decide that any of the additional amici questions are properly included, Petitioner respectfully requests leave to brief them at a later time.[11]

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[10] No scope of review issue had been raised in the district court. Jt. App. 135. The argument that a *Doyle v. Ohio*, 426 U.S. 610 (1976), violation is not a constitutional violation is raised for the first time in Wisconsin's brief at 41 and has clearly been waived. Moreover, such a question raises *Teague v. Lane*, 489 U.S. 288, 306-316 (1989) problems, for it seems unfair to confine an accused to direct appeal to raise new constitutional claims, but to permit the state to raise new constitutional claims on collateral review.

[11] The court's attention is directed to Respondent's brief in *Withrow v. Williams*, 91-1030 for a substantive response on the *Stone v. Powell* question.

The Question Presented

The question that *is* properly presented is whether the Seventh Circuit determination to replace the *Chapman v. California*, 386 U.S. 18 (1967), standard on federal habeas considerations of *Doyle v. Ohio* violations with the *Kotteakos v. United States*, 328 U.S. 750 (1948), standard comports with due process, the Sixth Amendment, and section 2254 as interpreted over a quarter of a century by this and other federal courts.[12]

A. The Practice and Experience of This Court and Lower Federal Courts Applying the *Chapman* Standard Suggest No Change is Justified

The Solicitor General notes at Brief p. 12, fn. 7, that the courts of appeals have uniformly held that *Doyle* error is subject to harmless error analysis. Such uniformity only increases the weight and level of justification necessary to change statutory construction that has been applied for decades without any particular indication that the standard was not working.

Moreover, this court as a whole, and indeed, virtually *every* sitting justice over the last quarter of a century, has repeatedly applied *Chapman* on habeas review of state

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[12] Indeed, the error is so central to the jury decisionmaking process, Petitioner asserts that proper application of the *Kotteakos* standard should cause the writ to issue. (Pet. Br. 36-37, quoting *Kotteakos*, 328 U.S. at 760)

convictions.[13] Such consistent application by both this court and lower federal courts (as well as state courts in

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[13] *1960s DECISIONS: Stovall v. Denno*, 388 U.S. 293, 306 (1967) (J. Black in dissent would have remanded for consideration under *Chapman*); *Roberts v. LaVallee*, 389 U.S. 40, 44 (per curiam) (1967) (Justice Harlan); *Anderson v. Nelson*, 390 U.S. 523, 524 (1968) (per curiam, "[W]e agree with [the dissenting judge in the Court of Appeals] that comment on a defendant's failure to testify cannot be labeled harmless error in a case where such comment is extensive, where the inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that would have supported acquittal.")

1970s DECISIONS: Dutton v. Evans, 400 U.S. 74, 90, 108 n.10 (1970) (concurring and dissenting opinions apply *Chapman*, including Chief Justice Burger, and Justices Blackmun, Stewart, Marshall, Black, Brennan and Douglas); *Chambers v. Maroney*, 399 U.S. 42 (1970) (direct review of state habeas, 7 justice opinion for the court applied *Chapman* as did the separate opinion by Justice Harlan); *Whiteley v. Warden of Wyoming Penitentiary*, 401 U.S. 560, 569 n.13 (1971) (dissent by J. Black, C.J. Burger and Justice Blackmun applies *Chapman* test.); *Milton v. Wainwright*, 407 U.S. 371, 378, 382 (1972) (every justice applies harmless error test); *Loper v. Beto*, 405 U.S. 473, 483 n.12, 485 (1972); *Cupp v. Naughten*, 414 U.S. 141, 143 n.2 (1973) (harmless error test not reached, because no error); *Mullaney v. Wilber*, 421 U.S. 684, 705 (1975) (Concurring opinion of Justice Rehnquist joined by C.J. Burger.) *Stone v. Powell*, 428 U.S. 465, 496 (1976) (C.J. Burger for the court, "The operation of the [exclusionary] rule is therefore unlike that of the Fifth Amendment's protection against compelled self incrimination."); *Estelle v. Williams*, 425 U.S. 501, 506-507 (1976) (C.J. Burger opinion cites *Chapman* with approval); *Henderson v. Morgan*, 426 U.S. 637, 647, 650 (1976) (both the opinion for the court by Justice Stevens and separate opinion by Justice White refer to the harmless error standard as appropriate); *Francis v. Henderson*, 425 U.S. 536, 553 n.4 (1976); *Moore v. Illinois*, 434 U.S. 220, 222, 233-234 (1977) (7 Justices remand for application of *Chapman*, Justice Blackmun concurs in Chapman remand.); *Wainwright v. Sykes*, 433 U.S. 72, 97-98,

116-117 (1977) (Justice White concurrence describes what the court does as application of harmless error analysis, dissent by Justices Brennan and White, prejudice in the cause and prejudice test "appears to bear a strong resemblance to harmless error doctrine."); *Parker v. Randolph*, 442 U.S. 62, 70-71 & n.5, 78, 81 (1979); *Rose v. Mitchell*, 443 U.S. 545, 552-59 (1979) (Justice Blackmun for the court rejected Justice Jackson's position that racial discrimination in grand jury selection was always harmless error if the trial jury was untainted. The court also rejected a *Stone v. Powell* argument, 443 U.S. 560-61, and pointed out that the state judges might be too close to the grand jury system to appreciate its defects. 443 U.S. 563. Dissent by Justice Rehnquist, 443 U.S. 587 n.10 "[this] has nothing to do with the guilt or innocence of the prisoner."); *Ulster County Court v. Allen*, 442 U.S. 140, 177 (1979) (dissent by Justice Powell).

1980s DECISIONS: Cuyler v. Sullivan, 446 U.S. 335, 349 (1980); *Hopper v. Evans*, 456 U.S. 605, 613-14 (1982); *Rushen v. Spain*, 464 U.S. 114, 117 n.2, 120, 122, 128 nn.6 & 7 (1983); *Strickland v. Washington*, 466 U.S. 668, 693, 711 (1984); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 198 n.6 (1984); *Francis v. Franklin*, 471 U.S. 307, 325 part III (1985); *Rose v. Clark*, 478 U.S. 570, 582, 588 (1986) (question whether automatic reversal analysis or *Chapman* analysis should apply to jury instructions that violate *Sandstrom v. Montana*, 442 U.S. 510 (1979) (Justice Stevens concurs critical of applying harmless error if constitutional error goes beyond reliability of the guilt or innocence determination, but that is the value being protected in this case. Justice Blackmun in dissent, "When a defendant contests the issue of intent a reviewing court will rarely be capable of deciding whether the error contributed to the verdict; it will have no way of knowing how the jury treated the question of intent."); *Kimmelman v. Morrison*, 477 U.S. 365, 382, 395 n.2 (1986) (*Stone v. Powell* restrictions on habeas held inapplicable to 6th Amendment claims of ineffective assistance of counsel, Justice Brennan for the court, Justice Powell concurs joined by C.J. Burger and Justice Rehnquist); *Wainwright v. Greenfield*, 474 U.S. 284, 290 n.5, 291, 301

their own proceedings) indicate the viability of the *Chapman* standard and are entitled to deference.[14]

(1986) (silence of defendant used to impeach insanity plea) (Justice Stevens' opinion for the court quotes Justice White from *United States v. Hale*, 422 U.S. 171 (1975) that due process is offended by the use of defendant's silence at trial. Justice Rehnquist and C.J. Burger concur, a minute extract from the prosecution's closing argument can be harmless error); *Burger v. Kemp*, 483 U.S. 776 (1987) (didn't actually need to apply harmless error); *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987); *Teague v. Lane*, 489 U.S. 288 (1989) (issue not reached); *Harris v. Reed*, 489 U.S. 255 (1989) (implicit in remand); *Perry v. Leeke*, 488 U.S. 272, 278, 285 (1989) (Justice Stevens' opinion for court, dissent by Justice Marshall, joined by Justices Brennan and Blackmun).

1990s DECISIONS: Yates v. Evatt, 111 S.Ct. 1884, 1897, 114 L.Ed.2d 432 (1991) (on certiorari from habeas in state court, Justice Souter opinion for the court, Justice Scalia and Justice Blackmun concur); *Estelle v. McGuire*, 112 S.Ct. 475, 484, 116 L.Ed.2d 385 (1991) (Justice O'Connor and Stevens concur in part, dissenting in part); *Parker v. Dugger*, 111 S.Ct. 731, 738, 112 L.Ed. 812 (1991); *Stringer v. Black*, 112 S.Ct. 1130, 1137-40, 1145 (1992) (Justice Souter's dissent joined by Justice Thomas and Chief Justice Rehnquist discusses harmless error analysis as not required in sentencing case when no eighth amendment violation occurred.); *Wright v. West*, 112 S.Ct. 2482, 2493 (1992).

[14] "We must be mindful of the cannon that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 (1981). Federal courts are charged with executing the federal habeas statutes.

B. Statutory Interpretation Cases such as *Chapman* Should be Given Particular Deference, Since Congress Can Overturn a Decision it Considers Incorrect, Unlike Constitutional Decisions

The active consideration by Congress of the standard of review involved in the case at bar has already been suggested at Petitioner's Brief pp. 18-28. The weight to be attributed to Congressional inaction regarding judicial construction of a federal statute depends upon a large number of factors, including the passage of time, implicit approval and related amendments. "Of course, the view of later Congresses does not establish definitively the meaning of an earlier enactment, but it does have persuasive value." *Bell v. New Jersey and Pennsylvania*, 461 U.S. 773, 784 (1983). Moreover, the nature of the expression of view by subsequent Congresses has weight.[15] However, "Where action upon a statute or practical and contemporaneous interpretation has been called to the legislature's attention, there is more reason to regard the failure of the legislature to change the interpretation as presumptive

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[15] Even authorization of expenditures sometimes validates judicial interpretation. *Alaska S.S. Co. v. United States*, 290 U.S. 256, 262 (1933), see also *Manhattan Properties v. Irving Trust Co.*, 291 U.S. 320, 334-36 (1933) ("In this situation 'only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted.' If the rule is to be changed, Congress should so declare." In 1976 Congress enacted this court's rules governing sections 2254 and 2255 cases with certain changes, including an addition to rules 8 (c) Pub.L. 94-426, 90 Stat. 1334. By then significant Congressional consideration of *Chapman* had already taken place (See Petitioner Br. pp. 19-20).

evidence of its correctness." Sutherland, *Statutory Construction*, (5th Ed.) Section 49.10, Vol. 2b, p. 76 (1992). Frankly, the appearance of Congressional acceptance of the harmless error test by Congressional leaders of both parties across the entire political spectrum is quite impressive. (Pet. Br. 27)

Moreover, the *Chapman* decision of 1967 is for all intents and purposes a contemporaneous interpretation of the 1966 amendments to the federal habeas corpus legislation, legislation which specifically addressed the weight to be given to certain state court determinations. "Long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration and enforcement, the courts, and the public constitutes an invaluable aid in determining the meaning of a doubtful statute." Sutherland, *Statutory Construction*, Sec. 49.03, Vol. 2b, p. 7.[16] "[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977)[17]

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[16] Silence for 21 years has evidenced Congressional approval. *United States v. Elgin, J. & E. Ry. Co.*, 298 U.S. 492, 500 (1936); *see also, Kelly v. Robinson*, 479 U.S. 36, 53 (1986).

[17] *See also, State of Missouri v. Ross*, 299 U.S. 72, 75 (1936), *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488-89 (1940), and *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979). "[T]he Congress is at liberty to correct our mistakes of statutory construction, unlike our constitutional interpretation, whenever it sees fit. The controlling principles were best stated by Mr. Justice Brandeis: 'Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true

The Harmless Error Standard

Wisconsin's brief at p. 32. n. 9, and the Solicitor General's brief at Part A of the Argument, display confusion about Petitioner's argument. It was stated at Petitioner's brief, p. 4, "This court should continue the harmless error standard on collateral review of state convictions. . . . " Petitioner's attorney was certainly unaware that any argument for "automatic reversal" was being made.

The *Chapman* harmless error standard *already* implicates a threshold decision. Neither de minimus constitutional error, nor constitutional error that the court judges could have had no material impact upon the jury determination are grounds for issuing the writ. Such threshold determination itself serves every legitimate interest in comity asserted by Wisconsin or amici. Moreover, the

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even where the error is a matter of serious concern, provided correction can be had by legislation. . . .' *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-407 (1932) (dissenting opinion) (footnotes omitted)", *Monell v. Department of Social Services*, 436 U.S. 658, 714-715 (1978) (dissent by Justice Rehnquist joined by Chief Justice Burger) (citations omitted). *See also* Justice Stevens' opinion for the court in *Square D. Company v. Niagara Frontier Thrift Bureau, Inc.*, 476 U.S. 409, 424 (1986), which similarly cited Justice Brandeis as well as Levi, *An Introduction to Legal Reasoning*, 15 U.Chi.L.Rev. 501, 540 (1948): "The doctrine of finality for prior decisions setting the course of the interpretation of a statute is not always followed . . . Nevertheless, the doctrine remains as more than descriptive. More than any other doctrine in the field of precedent, it has served to limit the freedom of the court. It marks an essential difference between statutory interpretation on the one hand and case law and constitutional interpretation on the other."

harmless error threshold determination displays appropriate deference to the uncertainty attendant upon jury determinations while recognizing that even some CONSTITUTIONAL errors have little or no impact upon seriously contested issues.

Were evidence cited of wholesale overturnings of state convictions by application of the *Chapman* standard on collateral review, the hyperbole that habeas reviews "frustrat[e] both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," (Solicitor General's Br. p. 13, quoting, *Murray v. Carrier*, 477 U.S. 478, 487 (1986)) might be more appropriate.[18] The authorities cited by Wisconsin and amici contain neither empirical evidence refuting the psychological studies discussed in Petitioner's Brief pp. 28-36, nor empirical evidence that *Chapman* has not worked. The only "empirical evidence" mentioned by any authority is a 1938 survey by an ABA committee of the opinions of judges in five states on permitting adverse comment on the defendants' failure to testify.[19] That is a pretty thin reed for overturning a quarter century of precedent. Besides tangential remarks at Wisconsin Br. p. 32, n. 9, the empirical studies cited by Petitioner remain unchallenged.

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[18] "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency." Justice Frankfurter for the court in *New York v. United States*, 326 U.S. 572, 583 (1946).

[19] Report to the Attorney General on Adverse Inferences From Silence, 22 U. Mich. J. of Law Reform 1005, 1070 (1989).

The problem illustrated by such empirical studies, and the application of the *Chapman* harmless error test in the case at bar, is that once a determination is made that the harmless error threshold has been passed, the court has determined that some impact may have occurred on the jury deliberation and decision, but the court's ability to quantify that impact is non-existent. When determination of guilt depends on determination of intent, to sanction the little bit of poison the Wisconsin special prosecutor injected into the trial, virtually eliminates the Fifth Amendment protection against self incrimination from all criminal trials involving intent. To presume that the limited number of cases this court takes on direct review will effectively deter the actions of prosecutors in thousands of cases a week begs reality. (Pet. Br. 43) Indeed, the possibility that serious review may occur in federal courts may be more important in ensuring that state courts fairly apply *Chapman* than actual review in federal court. Maintaining parallel standards in this instance also facilitates federal court review for the state court analysis will directly assist the federal habeas court while strengthening direct *Chapman* review.

While inferences such as those incorporated in the Statements of the Case for the Solicitor General and Wisconsin might be powerful arguments to a jury, the examples discussed supra in notes 4-6 highlight the importance of jury inferences, for only it is charged with final power to make inferences in criminal cases. Which inferences are actually adopted is usually a matter of pure speculation. To then speak of the "probative value of silence" (Wisconsin Br. 30), is to ignore Fifth Amendment text. Confessions extracted by rack and screw also have

"probative value," but the Fifth Amendment bars their use, even if the screw is only turned a couple of times. The inferences that Wisconsin suggests are appropriate on habeas (although inappropriate on direct appeal, Wisconsin Br. 34) employ compulsion within the meaning of the Fifth Amendment. It might be different if accidental use of post *Miranda* silence by the prosecutor was all that was involved. No appellation of "accidental use" can possibly apply to the central theme of the special prosecutor throughout the trial. Throughout trial, Brecht's "silence" was the keystone of the prosecution case. The fact of the matter is that the prosecutor didn't much care when Brecht was silent, he was going to use his silence for all it was worth. In the spirit of David Glasgow Farragut, it was "Damn the torpedoes [of the law], full speed ahead."[20] Only by ignoring the central thrust of the special prosecutor's closing arguments can these serious errors of law be found harmless (or indeed, even fail the *Kotteakos* test).

Empirical psychological studies suggest difficulties inherent in judicial review tainted by factors such as hindsight and outcome bias, and suggest enormous difficulties in making such findings as whether "error had a substantial and injurious effect on the outcome of the

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[20] Wisconsin's brief p. 8, n.3 ascribes confusion to the district court about one *Doyle* violation. However, the Wisconsin Court of Appeals made no such distinction, Jt. App. 42; and neither the Wisconsin Supreme Court, see Jt. App. 65-66, nor the Seventh Circuit, Jt. App. 109, made *any* finding on the matter. If the district court had difficulty making such a distinction, it is patently obvious that a jury of twelve citizens would be completely unable to master any difference.

case" (Solicitor General brief, p. 8). This is particularly the case when the constitutional error is the linchpin of the prosecution's case, as here.

The government's lever to move the jury to its view on intent was a lever it called "total lack of credibility" (Tr. 608, 619, 791); the lever's fulcrum was Brecht's failure to label the shooting an accident prior to hearing the government's case at trial (despite opening argument by the defense attorney disclosing the defense in considerable detail), and the heaviest weight on that lever was a congeries of inferences, surmises and theories, most based upon Todd Brecht's admitted homosexuality. (Jt. App. 137) This case is all about such inferences, many cases are not. The Wisconsin Supreme Court finding of trial error in barring testimony of Brecht's non assaultive, non-violent character (Jt. App. 72-73), while beyond this court's certiorari grant, is part of the background for the issue before the court. A person who has never before resorted to violence, but who has often resorted to flight, was portrayed by the prosecution as a cool, calculating, criminal, one who would profit from his sister's inheritance. Whether that depiction is correct, is an issue a jury should decide. We submit that a trial with serious constitutional error that directly impacts upon the jury fact-finding of intent, cannot in this case be denominated harmless error, and represents a fundamental deprivation of due process.

Moreover, the instant case illustrates that guilt or innocence is in many cases directly implicated by *Doyle* violations. *Doyle* violations can, as they did in this case, go directly to the heart of the case. Such cases are not

about technical errors, or constables blundering, they are about detention *simpliciter*.

Wisconsin's suggestion that the cost of applying *Chapman* would be great, and the additional protection minimal (Wisconsin Br. 35), cites no empirical support, and simply ignores a quarter century of federal court practice. With all due respect, that argument has been raised in Congress, and is now brought here because Congress has not yet found it persuasive.

Nor do Wisconsin and amici address the conundrum that the suggested standard may be more of a problem than a solution. (Pet. Br. 44-45) The need to change something that has worked for so long, been ratified through repeated and substantial Congressional consideration, by a standard developed for direct appeal (which assumes complete review of a trial record) is quite unclear.[21]

The exaggerated claim that "habeas corpus can be a rerun of the state appellate process" (Wisconsin Br. 30) is absurd. The procedural complexities of habeas corpus, the limited nature of questions that can *ever* be considered, and the harmless error test itself, all constitute guarantees that such a fear cannot come to pass. Moreover, neither Wisconsin nor amici seriously attempt to demonstrate it has come to pass. The parade of evils Wisconsin and amici conjure up simply have not opened many prison doors. Yet for those who are innocent, the right to the Great Writ remains critical.

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[21] "Much time would be lost in reviewing legal and factual issues that the state court is better suited to address expeditiously." *Harris v. Reed*, 489 U.S. 255, 264-265, and n.12 (1989).

Conclusion

Wherefore, petitioner prays for the relief stated in his initial brief.

Respectfully submitted,

/s/ Allen E. Shoenberger
Court Appointed Counsel

No. 91-7358

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In the Supreme Court of the United States

OCTOBER TERM, 1992

TODD A. BRECHT, PETITIONER

v.

GORDON A. ABRAHAMSON, SUPERINTENDENT,
DODGE CORRECTIONAL INSTITUTION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a violation of the holding of *Doyle* v. *Ohio*, 426 U.S. 610 (1976), which bars the government's use for impeachment purposes of a defendant's silence after receiving *Miranda* warnings, requires a federal habeas court to overturn a state conviction even if the error did not have a substantial influence on the outcome of the trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

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DODGE CORRECTIONAL INSTITUTION

ON WRIT OF CERTIORARI
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FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns the standard a federal court should apply in deciding whether to overturn a conviction when it discovers on collateral review that the prosecutor at trial violated the holding of *Doyle* v. *Ohio*, 426 U.S. 610 (1976). Resolution of that question requires assessment of the proper balance between federal habeas jurisdiction and the finality of state determinations. The Court's analysis of that question is likely to affect the disposition of similar claims for collateral relief by federal prisoners under 23 U.S.C. 2255. The United States in the past has participated in significant cases raising claims re-

garding the application of harmless error analysis, see *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991); *Rose* v. *Clark*, 478 U.S. 570 (1986), and the scope of review of state criminal convictions on habeas corpus, see, *e.g.*, *Withrow* v. *Williams*, No. 91-1030 (set for argument Nov. 3, 1992); *Sawyer* v. *Whitley*, 112 S. Ct. 2514 (1992); *Wright* v. *West*, 112 S. Ct. 2482 (1992); *Murray* v. *Carrier*, 477 U.S. 478 (1986); *Reed* v. *Ross*, 468 U.S. 1 (1984); *Engle* v. *Isaac*, 456 U.S. 107 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

STATEMENT

1. Petitioner was incarcerated in Georgia state prison following his conviction for felony theft when his sister Molly Hartman paid the restitution for his crime and accepted temporary custody of him in Alma, Wisconsin. Molly was married to Roger Hartman, the district attorney for Buffalo County, Wisconsin. The Hartmans told petitioner, who was a heavy drinker and a homosexual, that he was not to drink alcohol or engage in homosexual activity while he remained at their home. Pet. App. 3a, 3b, 3c, 2d.

On October 17, 1985, no more than a week after petitioner moved in with the Hartmans, petitioner drank liquor and beer in their home and, having found a rifle in their gun cabinet, began shooting tin cans in their back yard. When Roger returned home, petitioner shot him in the back and fled in Molly's car. Because petitioner had taken the receiver of the upstairs telephone off the hook, the downstairs telephone was inoperable. Hartman crawled to a neighbor's house for help, where he told the neighbor and a police officer who arrived with paramedics that petitioner had shot him. Pet. App. 3a, 3b-4b, 3c-4c, 2d.

Petitioner's initial flight ended after he wrecked the car by driving it into a ditch. When a police officer stopped to inquire, petitioner falsely stated that Molly Hartman knew about the wreck and had called a tow truck. Petitioner then hitched a ride to Minnesota, where police stopped him in a shopping center. At first he lied about his identity, but when the police identified him they arrested him for the shooting of Hartman. Pet. App. 3a, 4b, 3c-4c, 2d.

2. Hartman died of the injuries sustained in the shooting, and the State of Wisconsin indicted petitioner for first-degree murder. At trial, petitioner testified in his own defense. He admitted shooting Hartman but claimed that the rifle had discharged by accident. Petitioner testified that Hartman's return had surprised him, that he did not want Hartman to see him with a rifle, and that the rifle fired when he tripped as he rushed upstairs to return it to the room from which he had taken it. Petitioner claimed that he yelled to Hartman and tried to find him to offer him aid, but that Hartman had disappeared. Petitioner stated that he then took Mrs. Hartman's car to look for Mr. Hartman and that when he spotted Mr. Hartman at the neighbor's door he panicked and drove away. Pet. App. 3a, 3b, 3c, 2d.

To rebut petitioner's defense, the prosecution called the coroner, who testified that the bullet had entered Hartman's upper body on a horizontal to slightly downward trajectory, a path inconsistent with a claim that the weapon had discharged while petitioner was falling. The prosecution also introduced evidence

that the rifle was found outside the house (where Hartman was shot), not inside by the stairs, and that a live round was jammed in the chamber (suggesting that petitioner had tried to fire another shot). The prosecution offered a motive for the killing: petitioner's hostility to Hartman because of the latter's objection to petitioner's homosexuality and to its practice in the Hartmans' home. The prosecution pointed out petitioner's failure to get help for Roger, his flight, his lies to the police, and his failure to mention anything about an accidental shooting to the officer who found him in the ditch, the man with whom he later hitched a ride, or the officers who arrested him at the shopping center. In addition, over defense counsel's objections, the prosecutor referred generally to petitioner's failure to offer his explanation before trial, thus implicitly referring to petitioner's silence between the time of arraignment (when petitioner received his *Miranda* warnings) and the time of trial.[1] The jury convicted petitioner

[1] The prosecutor twice asked petitioner whether he had told anyone at any time before trial that the shooting was accidental. See Pet. App. 5c (prosecutor's question on cross-examination: "In fact the first time you have ever told this story is when you testified here today was it not?"); *ibid.* (prosecutor's question on recross-examination: "Did you tell anyone about what happened in Alma?"). The prosecutor made three references to this point in his closing statement. See *ibid.* ("[R]emember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence."); *ibid.* ("[H]e made no statements to the law enforcement officers."); *ibid.* ("I know what I'd say, I'd say 'hold on, this was a mistake, this was an accident, let me tell you what happened,' but he didn't say that did he. No, he waited until he hears our story.").

of murder, and he was sentenced to life imprisonment. Pet. App. 3a-5a, 4b, 4c-6c, 3d.

3. The Court of Appeals of Wisconsin reversed. Pet. App. 1a-7a. The court first held that the prosecutor's use of petitioner's pre-arrest silence was permissible under this Court's decision in *Jenkins* v. *Anderson*, 447 U.S. 231 (1980). Pet. App. 4a. Second, acknowledging that the federal Constitution permitted the use of his post-arrest, pre-*Miranda* silence, see *Fletcher* v. *Weir*, 455 U.S. 603 (1982), the court held that the trial court violated the Wisconsin Constitution by allowing use of such evidence at trial, and that the error was not harmless. Pet. App. 4a-5a. Finally, the court held that use of petitioner's post-*Miranda* silence violated the Due Process Clause and was sufficiently prejudicial to justify reversal. *Id.* at 5a-6a.

4. The Supreme Court of Wisconsin reversed and reinstated the conviction. Pet. App. 1b-11b. The court agreed with the court of appeals that use of the pre-arrest silence was permissible, *id.* at 6b-7b, but reversed the court of appeals' holding that the Wisconsin Constitution forbade use of petitioner's post-arrest, pre-*Miranda* silence, *id.* at 7b-8b. Finally, the court agreed that the use of petitioner's post-*Miranda* silence violated *Doyle* v. *Ohio*, 426 U.S. 610 (1976), Pet. App. 8b-9b, but concluded that the error "was harmless beyond a reasonable doubt," *id.* at 9b (quoting *Chapman* v. *California*, 386 U.S. 18, 24 (1967)). The court explained that the "improper references to [petitioner's] silence were infrequent," consuming "less than two pages of a 900-page transcript, or a few minutes in a four day trial in which

twenty-five witnesses testified,"[2] and that the prosecution's case against petitioner was quite strong even without the improper references. Pet. App. 9b.

5. Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Wisconsin. The court granted relief. Pet. App. 1c-11c. The court agreed with the Supreme Court of Wisconsin that the only objectionable use of petitioner's silence was the use of petitioner's post-*Miranda* silence (*id.* at 7c-8c), but disagreed with the state supreme court's conclusion that the use of that evidence was harmless beyond a reasonable doubt (*id.* at 8c-9c). The district court stated that a constitutional error in that context could be considered harmless only if the remaining evidence of guilt was "overwhelming." *Id.* at 9c. Because the court did not believe the evidence was "overwhelming," it concluded that overturning the conviction was appropriate. *Ibid.*

6. The Seventh Circuit reversed. Pet. App. 1d-15d. That court agreed that the use of petitioner's post-*Miranda* silence violated *Doyle*, but concluded that the error was not sufficiently prejudicial to justify overturning petitioner's conviction. The court concluded that it is inappropriate to reverse a state-court conviction on habeas corpus because of a *Doyle* error solely because the court cannot determine that the error was harmless beyond a reasonable doubt. Instead, the court reasoned, such convictions should

[2] The court noted that the state court of appeals' contrary conclusion rested at least in part on its view that the trial court erred not only in allowing the minimal reference to the post-*Miranda* silence, but also in allowing the additional references to the pre-*Miranda* silence. Pet. App. 9b.

be overturned only if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 12d (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). The court explained that the delays associated with collateral review followed by retrial "mak[e] it substantially more costly" to enforce *Doyle* on collateral attack than to enforce it on direct appeal, Pet. App. 11d, and pointed out that either standard would "infor[m] prosecutors that an effort to draw the jury's attention to the defendant's silence reduces the chance of conviction, and tells trial judges how to respond to the prosecutors' efforts." *Id.* at 12d. Accordingly, the court concluded that the balance of the costs and benefits supported applying the more lenient *Kotteakos* standard. *Id.* at 12d-14d.

Finally, observing that petitioner did not contend that the references to his post-*Miranda* silence had a substantial and injurious effect or influence on the trial, "and could not do so with a straight face, given the many more, and entirely proper, references to his silence preceding arraignment," the court held that the *Doyle* error would not support a writ of habeas corpus. Pet. App. 14d.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Doyle* v. *Ohio*, 426 U.S. 610 (1976), this Court held that it deprives a criminal defendant of due process for the government to introduce evidence at trial that the defendant remained silent after receiv-

[3] Judge Cudahy concurred in the judgment, reasoning that the *Chapman* standard was applicable to *Doyle* errors even on collateral review, but that the alleged error in this case was harmless even under that standard. Pet. App. 14d-15d.

ing the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). This case requires the Court to consider when a conviction should be overturned on collateral review on the basis of a violation of *Doyle*. Our analysis proceeds in two steps. First, violations of *Doyle* are not so inherently prejudicial as to justify automatic reversal in all cases. Second, when a *Doyle* error is considered on collateral review, the conviction should not be overturned unless the error had a substantial and injurious effect on the outcome of the case.[4]

A. This Court explained in *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991), that automatic reversal is not required for constitutional errors that occur "during the presentation of the case to the jury, and * * * may therefore be quantitatively assessed in the context of other evidence." *Id.* at 1264. Because *Doyle* errors are errors of that class, an appellate court is able to ascertain whether the error had any effect on the outcome of the trial. Accordingly, appellate courts need not automatically reverse all convictions involving a violation of *Doyle*.

B. In determining whether a *Doyle* error is sufficiently prejudicial to justify overturning a state-court conviction on habeas corpus, a federal court must take account of the important role that the States' separate adjudicatory processes play in our federal system, as well as the limited role that exists for collateral review in light of society's interest in the finality of criminal convictions. This Court has recognized

[4] The Court granted review in *Greer* v. *Miller*, 483 U.S. 756 (1987), to decide the question presented here, see *id.* at 761 n.3, but did not reach the question, because the Court concluded that *Doyle* had not been violated at all, *id.* at 764-767.

that those interests justify several important differences between the role of courts reviewing criminal convictions on direct appeal and the role of federal courts evaluating habeas corpus petitions filed by state prisoners.

Those interests are also pertinent in assessing the standard of review to determine whether an error is sufficiently prejudicial to justify overturning a state-court conviction on habeas corpus. The benefits of overturning a conviction on collateral review are significantly less than those on direct appeal, because the delay lessens the deterrent force of the federal rule. On the other hand, the costs of overturning a conviction on collateral review are significantly higher than the costs on direct appeal, because the lengthy delay makes retrial more difficult. Moreover, when the conviction is overturned on the basis of an error that did not substantially influence the outcome of the trial, the result justifiably undermines the public's confidence in the judicial process.

Those problems are particularly serious in cases like this one, where the alleged error does not infringe a rule designed to further the truth-seeking functions of the trial. Because a violation of *Doyle* results only in the admission of truthful evidence, the *Doyle* rule does not increase the accuracy of the judicial process. The factfinder at trial is fully capable of evaluating the evidence and determining whether it has significant probative force. Accordingly, whatever the rule with respect to other constitutional violations, the relevant balance of interests indicates that federal courts should not overturn a state-court conviction on habeas corpus because of a *Doyle* error unless the error "had substantial and injurious effect

or influence in determining the [outcome of the case]," *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946).

ARGUMENT

A FEDERAL HABEAS COURT SHOULD NOT OVERTURN A STATE CONVICTION BECAUSE OF AN IMPROPER REFERENCE TO THE DEFENDANT'S SILENCE AFTER RECEIVING *MIRANDA* WARNINGS UNLESS THE REFERENCE HAD A SUBSTANTIAL AND INJURIOUS EFFECT ON THE OUTCOME OF THE CASE

A. A Violation of *Doyle* Does Not Justify Automatic Reversal of a Conviction

This Court has never decided whether a violation of *Doyle* requires automatic reversal of a conviction.[5] As the Court recently explained, however, "[s]ince this Court's landmark decision in *Chapman* v. *California*, [386 U.S. 18 (1967)], * * * the Court has applied harmless error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1263 (1991). The basis for the broad application of the harmless-error doctrine is obvious:

> [T]he harmless-error doctrine is essential to preserve the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."

Id. at 1264 (quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986)); see also 28 U.S.C. 2111 (directing courts, on hearing any appeal or writ of certiorari, to give judgment after examining the record "without regard to errors or defects which do not affect the substantial rights of the parties"); Fed. R. Crim. P. 52(a) (directing courts to disregard "[a]ny error, defect, irregularity or variance which does not affect substantial rights").

The *Fulminante* Court also set forth the "common thread connecting" the cases in which it was determined that a particular type of constitutional error did not require automatic reversal: "[E]ach involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine [the effect the error had on the trial]." 111 S. Ct. at 1264. The other side of the coin—errors that require automatic reversal—comprises "structural defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." 111 S. Ct. at 1256.[6] As the Court explained, structural

[5] In *Doyle* itself, the State did not claim that the error might have been harmless. 426 U.S. at 619-620. Similarly, in *Wainwright* v. *Greenfield*, 474 U.S. 284 (1986), in which the Court found a *Doyle* violation where the prosecutor used the defendant's post-arrest, post-*Miranda* silence to rebut his insanity defense, the State did not contest the lower court's conclusion that the alleged error was prejudicial. *Id.* at 295 n.13.

[6] The Court noted several examples, namely, total deprivation of the right to counsel at trial, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), trial before a partial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927), unlawful exclusion of members of the defendant's race from a grand jury, see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), deprivation of the right to self-representation, see *McKaskle* v. *Wiggins*, 465 U.S. 168, 177-

defects result in automatic reversal because they affect "[t]he entire conduct of the trial from beginning to end," and thus "defy analysis by 'harmless-error' standards." *Ibid.*

Under that framework, a violation of *Doyle* is not sufficient to justify automatic reversal.[7] Such an error will not have any overarching effect on the entire trial process; rather, its effect is limited to putting before the jury a particular type of improper evidence. Courts are as capable of evaluating the probability that the improper evidence had an effect on the outcome of the case here as they are in similar areas where the harmless-error doctrine has been found applicable. See, *e.g.*, *United States* v. *Hasting*, 461 U.S. 499, 507-512 (1983) (applying harmless-error analysis to a comment on a defendant's failure to testify at trial[8]); *Chapman* v. *California*, 386 U.S.

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178 n.8 (1984), and deprivation of the right to a public trial, see *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984).

[7] The courts of appeals uniformly have held that *Doyle* error is subject to harmless-error analysis. See, *e.g.*, *United States* v. *Elkins*, 774 F.2d 530, 538-540 (1st Cir. 1985); *Leecan* v. *Lopes*, 893 F.2d 1434, 1442 (2d Cir.), cert. denied, 496 U.S. 929 (1990); *United States* v. *Cummiskey*, 728 F.2d 200, 204, aff'd after remand, 745 F.2d 278 (3d Cir. 1984), cert. denied, 471 U.S. 1005 (1985); *Williams* v. *Zahradnick*, 632 F.2d 353, 360-365 (4th Cir. 1980); *United States* v. *Blankenship*, 746 F.2d 233, 238 (5th Cir. 1984); *Martin* v. *Foltz*, 773 F.2d 711, 715 (6th Cir. 1985), cert. denied, 478 U.S. 1021 (1986); *Bass* v. *Nix*, 909 F.2d 297, 304-305 (8th Cir. 1990); *United States* v. *Newman*, 943 F.2d 1155, 1158 (9th Cir. 1991); *United States* v. *Pino*, 827 F.2d 1429, 1432-1433 (10th Cir. 1987); *United States* v. *Rivera*, 944 F.2d 1563, 1569-1570 (11th Cir. 1991).

[8] The Court held in *Griffin* v. *California*, 380 U.S. 609, 613-615 (1965), that such a comment violated the Self-Incrimination Clause of the Fifth Amendment.

at 22-26 (same); *Fulminante*, 111 S. Ct. at 1266 (applying harmless-error analysis to admission of an involuntary confession). Thus, a violation of *Doyle* should not result in automatic reversal of a conviction.

B. A *Doyle* Error Is a Basis for Reversal on Collateral Review Only If It Has a Substantial and Injurious Effect on the Outcome

1. "The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights." *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982). Accordingly, "[n]owhere has a 'proper respect for state functions' been more essential to our federal system than in the administration of criminal justice." *Rose* v. *Mitchell*, 443 U.S. 545, 585 (1979) (Powell, J., concurring in judgment) (quoting *Younger* v. *Harris*, 401 U.S. 37, 44 (1971)). Similarly, the tendency of federal habeas review to "frustrat[e] both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *Murray* v. *Carrier*, 477 U.S. 478, 487 (1986) (internal quotation marks omitted), has led to a limited role for federal courts evaluating habeas corpus petitions filed by persons convicted of crimes in state courts. See *Engle* v. *Isaac*, 456 U.S. at 127 ("Liberal allowance of the writ * * * degrades the prominence of the trial itself."); *Duckworth* v. *Eagan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring); *Harris* v. *Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting) ("[F]ederal habeas review * * * intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.").

Furthermore, the interest in finality reflected in the "basic distinction between direct review and col-

lateral review," *United States* v. *Frady*, 456 U.S. 152, 165 (1982), has led to a limited role for federal courts in considering collateral attacks on criminal convictions, even with respect to federal convictions. See *McCleskey* v. *Zant*, 111 S. Ct. 1454, 1468 (1991) ("Neither innocence nor just punishment can be vindicated until the final judgment is known."); *Frady*, 456 U.S. at 164-165 ("Once the defendant's chance to appeal has been waived or exhausted, * * * we are entitled to presume he stands fairly and finally convicted."); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.13 (1977); *Mackey* v. *United States*, 401 U.S. 667, 682-683 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

Hence, "the notion that different standards should apply on direct and collateral review runs throughout [the Court's] recent habeas jurisprudence." *Wright* v. *West*, 112 S. Ct. 2482, 2490 (1992) (separate opinion of Thomas, J.) (citing *Greer* v. *Miller*, 483 U.S. 756, 768-769 (1987) (Stevens, J., concurring in judgment)); see *Duckworth* v. *Eagan*, 492 U.S. at 212-213 (O'Connor, J., concurring). For example, some types of issues are not cognizable on federal habeas review at all, so long as the State affords a full and fair opportunity for litigation in its courts. See *Stone* v. *Powell*, 428 U.S. 465, 489-496 (1976). Similarly, other types of claims are cognizable only if they rest on doctrines that existed before the judgment became final. See *Teague* v. *Lane*, 489 U.S. 288, 305-310 (1989) (plurality opinion of O'Connor, J.).

2. Those same "considerations of finality," *Duckworth*, 492 U.S. at 213 (O'Connor, J., concurring), are pertinent in determining what standard a federal habeas court should apply in considering whether to overturn a state conviction on collateral review. Title

28 requires a federal court to dispose of a petition for a writ of habeas corpus "as law and justice require." 28 U.S.C. 2243. Accordingly, the Court should formulate rules in this area—as it has in other areas of habeas corpus procedure—"through a sensitive weighing of the interests implicated by federal habeas corpus adjudication of constitutional claims determined adversely to the prisoner by the state courts." *Kuhlmann* v. *Wilson*, 477 U.S. 436, 448 (1986) (plurality opinion of Powell, J.); see *Stone* v. *Powell*, 428 U.S. at 489-492.

The benefits of overturning a conviction on collateral review because of an error that had no substantial effect on the trial are nugatory. Whatever the standard on collateral review, prosecutors will have a significant incentive "to toe the constitutional mark," *Teague*, 489 U.S. at 307 (plurality opinion of O'Connor, J.), because a constitutional violation will be a basis for overturning the verdict on direct appeal unless the prosecutor can show that the violation was "harmless beyond a reasonable doubt," *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Moreover, if federal courts continue to overturn convictions on collateral review whenever the error "had substantial and injurious effect or influence in determining the jury's verdict," *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946), the possibility of collateral review would continue to have a significant deterrent effect in any case where the violation would give the prosecutor a substantial benefit at trial.

On the other hand, this Court repeatedly has emphasized the costs to the justice system of overturning a conviction on collateral review. First, the be-

lated retrials that result from reversals on collateral review seriously undermine the capacity of the judicial system to discern the truth. "Witnesses die or move away; physical evidence is lost; memories fade." *Vasquez* v. *Hillery*, 474 U.S. 254, 280 (1986) (Powell, J., dissenting).[9] Moreover, and perhaps most unfortunately, a willingness to overturn final criminal convictions based on errors that did not have a substantial effect on the outcome of the trial undermines public respect for the justice system. Such a devil-take-the-hindmost demand for perfection in state criminal trials thus robs the judicial process of legitimacy by "cast[ing] the criminal system as a game and send[ing] the message that society is so unmoved by the violation of its own laws that it is willing to frustrate their enforcement for the smallest of returns." *Duckworth*, 495 U.S. at 212 (O'Connor, J., concurring).

3. In light of those considerations, federal habeas courts should not overturn state convictions based on *Doyle* errors unless the error had a substantial influence on the outcome of the trial. See *Greer* v. *Miller*, 483

[9] See *Zant*, 111 S. Ct. at 1468 ("[W]hen a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time • • • prejudice the government and diminish the chances of a reliable criminal adjudication.") (internal citation and quotation marks omitted); *Duckworth*, 492 U.S. at 211 (O'Connor, J., concurring); *Engle* v. *Isaac*, 456 U.S. at 127-128 ("Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible [and thus] reward the accused with complete freedom from prosecution."); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 147 (1970) (noting that in many cases the right to retry the defendant will exist as "a matter of theory only").

U.S. 756, 768-769 (1987) (Stevens, J., concurring in judgment) ("[I]n typical collateral attacks, such as today's, *Doyle* errors are not so fundamentally unfair that convictions must be reversed whenever the State cannot bear the heavy burden of proving that the error was harmless beyond a reasonable doubt.") (emphasis omitted). A violation of *Doyle*, unlike some other constitutional errors, does not undermine the truthseeking purpose of the trial, because it results in nothing more prejudicial than the admission of truthful evidence regarding the defendant's silence. As this Court has recognized, there are many circumstances in which evidence of a defendant's silence is genuinely probative of relevant issues. Hence, the "[c]ommon law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." *Jenkins* v. *Anderson*, 447 U.S. 231, 239 (1980). If the defendant can produce evidence (such as his own testimony) that he remained silent not because he had not yet fabricated an exculpatory explanation, but instead in reliance on the *Miranda* warnings, he is free to present that evidence at trial. It may be that the defendant's silence in such a case will be ambiguous, but the factfinder should be just as competent to evaluate the opposing evidence and draw appropriate inferences as it is to resolve any of the other fact issues placed before it in criminal cases.[10] In sum,

[10] To be sure, the Court in *Doyle* suggested that a defendant's silence is "*insolubly* ambiguous." 426 U.S. at 617 (emphasis added); see *United States* v. *Hale*, 422 U.S. 171, 180 (1975) (suggesting that "evidence of silence at the time of arrest generally [is] not very probative of a defendant's credibility"). But the *Doyle* Court made it clear that its decision

Doyle does not further the truthseeking purpose of a trial because it deprives the factfinder of truthful evidence.

Accordingly, the "substantial influence" standard adopted by the court of appeals better reflects the relevant interests than the "beyond a reasonable doubt" standard *Chapman* articulated for cases on direct appeal. The "substantial influence" standard better accommodates society's interest in the finality of criminal judgments, without unduly undermining the incentives habeas corpus review gives prosecutorial officials to comply diligently with constitutional restrictions at trial or substantially increasing the

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rested not on any doubts about the constitutionality of a rule finding such evidence relevant, for the Court stated that it was not "necessary * * * to express an opinion on the probative value for impeachment purposes of petitioners' silence." 426 U.S. at 618 n.8. Rather, the *Doyle* Court rested its holding squarely on the notion that the implicit "assurance [conveyed by the *Miranda* warnings] that silence will carry no penalty * * * [made it] fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618; see *Wainwright* v. *Greenfield*, 474 U.S. 284, 294 (1986) ("the ambiguity of the defendants' silence in *Doyle* merely added weight to the Court's principal rationale, which rested on the implied assurance contained in the *Miranda* warning"); *Greer* v. *Miller*, 483 U.S. at 763.

The Court's subsequent holdings have made it clear that the relief granted in *Doyle* rests not on doubts about the probative value of evidence of silence, but solely on the unfairness of using such evidence when the silence is induced by government action. See *Fletcher* v. *Weir*, 455 U.S. 603, 605-607 (1982) (allowing use of post-arrest silence in case where defendant did not receive *Miranda* warnings); *Jenkins* v. *Anderson*, 447 U.S. 231, 238-240 (1980) (allowing use of pre-arrest silence).

risk that a federal court will uphold an unjust conviction."[11] Moreover, because federal courts already apply the standard to violations of federal rules and statutes that occur in federal trials, see, *e.g.*, *United States* v. *Lane*, 474 U.S. 438 (1986), courts can turn to an existing body of law for aid in applying that standard in particular cases.

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[11] This case does not require the Court to announce a general rule regarding the standard for deciding whether to overturn convictions on collateral review. As the Seventh Circuit and petitioner note, Pet. App. 13d; Pet. Br. 49, this Court on occasion has applied the *Chapman* standard to certain claims it has considered on collateral review. In addition to the cases cited by the Seventh Circuit and petitioner, we note *Anderson* v. *Nelson*, 390 U.S. 523 (1968) (per curiam), in which this Court applied the *Chapman* standard to overturn a state-court conviction on collateral review based upon "extensive" improper comment on the defendant's failure to testify at trial. *Id.* at 525. *Anderson* was a summary reversal without benefit of argument; the question whether the *Chapman* standard or some other standard should apply to collateral review of the defendant's claim was not addressed in the certiorari papers before the Court. Moreover, in none of the cited cases has the Court itself directly considered the question presented here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 91-7358

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1991

TODD A. BRECHT
Petitioner,

v.

GORDON A. ABRAHAMSON, Superintendent
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

BRIEF OF THE COUNTY OF WAYNE, MICHIGAN AS AMICUS CURIAE SUPPORTING RESPONDENT

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STATEMENT OF THE QUESTION

SHOULD VIOLATIONS OF "PROPHYLACTIC" RULES BE CONSIDERED DIFFERENTLY THAN VIOLATIONS OF THE ACTUAL CONSTITUTION, AND ARE THERE ARTICLE III CONCERNS WITH FEDERAL ENFORCEMENT OF PROPHYLACTIC RULES IN STATE CASES ABSENT ANY FINDING OF CONSTITUTIONAL ERROR?

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INTEREST OF THE AMICUS

Amicus is the County of Wayne. The Wayne County Prosecutor's Office represents the State of Michigan in many habeas corpus petitions arising out of criminal cases prosecuted in Wayne County, and thus many valuable resources are spent on these matters. Amicus is also counsel for the Warden in the pending case of Withrow v Williams, involving an issue closely related to that raised in this case; namely, whether the principles of Stone v Powell should be applied to Miranda claims raised on habeas corpus. The outcome of the litigation in this case is thus of great interest and importance to the County of Wayne.

"Today's extension...is the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restrictions upon law enforcement....(these layers designed) to protect the right against compelled self-incrimination, found (at last!) in the Constitution."

Dissent of Justice Scalia, Minnick v Mississippi, 112 L Ed 2d 489, 506 (1990)

"Doyle is therefore a prophylactic rule designed to protect another prophylactic rule from erosion or misuse."

*****

"We deal with such a penumbral doctrine--one that until Brown would not have been open at all on collateral review."

Brecht v Abrahamson, 944 F 2d 1363, 1370, 1373 (CA 7, 1991)

I. Introduction

This Court has granted certiorari on the question of whether the standard of review on federal habeas corpus as to errors involving a violation of a prophylactic rule should be whether the error was harmless beyond a reasonable doubt, the standard for constitutional error, or whether the error

had a substantial and injurious effect or influence on the jury's verdict, the standard followed by the Seventh Circuit in this case. This Court also has pending before it a case on certiorari granted in which the issue is whether Miranda claims should be cognizable on federal habeas corpus at all. Withrow v Williams, No. 91-1030. A claim of Miranda error which is unaccompanied by a claim or finding of involuntariness is a claim of a violation of a prophylactic rule, rather than of the Constitution itself. The Seventh Circuit in this case has held that the rule of Doyle v Ohio is a prophylactic rule designed to protect the Miranda prophylactic rule from misuse. If this Court were to hold in Withrow v Williams that Stone v Powell, 428 US 465, 96 S Ct 3037, 49 L Ed 2d 1067 (1976) should be extended to Miranda claims because of their prophylactic nature, that holding might well mean that the

underlying Doyle claim in the instant case should not have been reviewed at all on habeas corpus. But beyond this, it is a fact that in neither Withrow v Williams nor the present case is a claim that the Constitution was violated before the Court. Amicus submits that there is thus a critical underlying point at issue in these cases, which the Court ought also to consider, as it goes to the very jurisdiction of this Court, and of the lower federal courts as well; that is, whether a federal court has jurisdiction under Article III (and the federal habeas corpus statute) to consider claims which, if sustained, do not amount to a finding of a violation of the Constitution or any federal statute?

II. Prophylactic Rules and The Law of Presumptions

What is a prophylactic rule but a rule which is designed to protect against the violation of some other principle, and in

constitutional cases, a constitutional principle? Clearly, with prophylactic rules it is possible to violate the rule without violating the Constitution itself (else the rule would not be a prophylactic rule, but the very Constitutional principle itself). Prophylactic rules, then, create presumptions about that which is to follow from a finding of their violation; but where the presumption is considered irrebuttable it becomes a rule of law, and violates Article III of the Constitution.

The law of evidentiary presumptions is itself a morass, but there are two sorts of presumptions which are generally recognized: permissive presumptions, and "mandatory" presumptions. With a "permissive" presumption the fact-finder is instructed that it "may," but need not, infer the fact to be presumed from the facts underlying the presumption should those facts be proven by the requisite standard. With a "mandatory"

presumption the fact-finder is instructed that it must find the presumed fact proven if it finds the facts underlying the presumption proven by the requisite standard. Put another way, the fact-finder is in effect told that the underlying facts are a definition of the presumed fact, so that a finding of the underlying facts is a finding of the presumed fact. When a mandatory presumption is also irrebuttable because it operates as a definition it is simply a rule of law, then, another way of saying the same thing: for example, A plus B equals C.

It is the accepted wisdom that in criminal cases only permissive presumptions are constitutional. While amicus believes this doctrine to be mistaken, amicus also believes there is yet a third sort of presumption, a conditionally mandatory (rebuttable) presumption; that is, a fact which must be found if the foundation facts

are proven by the requisite standard, unless the opposing party comes forward with evidence contradicting the presumed fact. Prophylactic rules to protect constitutional rights, as created and applied by this Court, operate, as against the Government, as mandatory presumptions on some occasions, and as conditionally mandatory presumptions on others. With regard to the Government's case the prophylactic rule operates as an irrebuttable mandatory presumption; with regard to impeachment, for example, it operates as a conditionally mandatory presumption.

The Miranda rules provide an excellent illustration of this point. With regard to use by the Government of a statement taken in violation of Miranda (or other prophylaxis spun out of Miranda, such as Edwards v Arizona, 451 US 477, 101 S Ct 1880, 68 L Ed 2d 378 (1981) and Arizona v Roberson, 100 L Ed 2d 704 (1988)), a

statement taken in violation of the prophylactic rule is mandatorily and irrebuttably inadmissible. Since the Constitution itself proscribes only involuntary statements, and since the federal courts have constitutional authority only over federal claims, the rule must of necessity be that a violation of Miranda equals a violation of the Constitution; that is, a Miranda violative statement is involuntary. No amount of evidence of voluntariness in fact put forward by the Government can make any difference--indeed, it is irrelevant. But with regard to impeachment, this is not so. The mandatory presumption of involuntariness from the violation of the prophylactic rule is rebuttable, and if the Government can prove voluntariness in fact, then the statement may be used to impeach.

Obviously, this approach is inherently

contradictory. It cannot make "constitutional sense" to define a statement as involuntary because Miranda violative when the statement is to be used to prove guilt, but to define the same statement as voluntary when used to impeach. The truth is, as the Court has repeatedly said, that the impeachment cases are correct. A Miranda violative statement is not of necessity involuntary, and involuntariness cannot be defined by the Miranda prophylaxis. To so define it is to amend the Constitution, to create an Amendment 5a. This is true of all prophylactic rules the violation of which is not necessarily a violation of the Constitution--to mandate a remedy of exclusion without a finding of constitutional error is beyond the Article III authority of federal courts, and such claims should thus not be cognizable on federal habeas corpus at all.

III. Article III and Irrebuttable Prophylactic Presumptions

Again, the Article III difficulty with federal enforcement of prophylactic rules, absent a finding of a violation of the Constitution, is made plain by reference to the Fifth Amendment. The Fifth Amendment to the Federal Constitution provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself." In Miranda the Court established that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination", and further established the mechanism, the warnings, necessary to "safeguard" the Fifth Amendment right. A defendant may "waive" these rights delineated in the warnings (to remain

silent, to have counsel, either retained or appointed, to cutoff questioning at any time), but the waiver must be "voluntary, knowing, and intelligent."

However, this Court has on more than one occasion recognized that these procedural safeguards, these warnings, "...(are) not themselves rights protected by the Constitution." Michigan v Tucker, 417 US 433, 94 S Ct 2357, 41 L Ed 2d 182 (1974). Indeed, in Harris v New York, 401 US 222, 91 S Ct 643, 28 L Ed 2d 1 (1971) (1971) this Court explicitly recognized that it is possible for a Miranda-defective confession nonetheless to be voluntary; that is, not compelled. In these circumstances, held the Court, the voluntary confession may be used for impeachment purposes, though not for substantive evidence in the case-in-chief in order to prove guilt. Thus, it logically

follows, and no doubt has occurred, that a confession may be excluded as proof of guilt in a circumstance where it was not compelled, but rather a court has ruled explicitly that it was voluntarily given. The confession is excluded as proof of guilt because of the violation of a right not itself "protected by the Constitution" though the very right protected by the Constitution, the right not to be compelled to be a witness against oneself, has not been violated. Once the Court recognized that not every Miranda defective confession is involuntary, it in essence recognized that Miranda was wrongly decided, for it implicitly recognized that Miranda had required States to exclude confessions from evidence though they were not obtained in violation of the Constitution, a holding beyond the authority of any federal court. This is true of all prophylactic rules where there is no finding that the Constitution

itself was violated.

Once the Court recognized that not every Miranda-defective confession can be said to have been gained in violation of the Fifth Amendment (that is, coerced), it admitted that it had gone beyond its Article III power in Miranda, for if it is true in a particular case that a confession is voluntary though Miranda-defective, so as to be admissible for impeachment under the rule of Harris v New York, from whence comes the constitutional authority of any federal court to order a state court to exclude from evidence a confession gained in violation of no constitutional right (it being remembered that the Miranda rights are not themselves "rights protected by the Constitution")? Certainly not from Article III of the Constitution, giving all Judicial Power "in Law and Equity, arising under this Constitution, the Laws of the United

States...." to the federal courts (emphasis added).

Professor Grano has persuasively demonstrated the jurisdictional difficulty with federal judicial remedies in State cases where there has been found no violation of the Constitution, but only of a prophylactic rule designed to protect a Constitutional right, it being possible to violate the prophylactic rule without violating the Constitution. See "Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy", 80 Northwestern L Rev 100 (1985). The Miranda rules are plainly "prophylactic" rules, and have been referred to in this manner by the Court itself. They are prophylactic because their purpose is to "safeguard" the Fifth Amendment right against compulsory self-incrimination, and thus, can be violated without violating the Constitution

itself. Under Article III, prophylactic rules, as applied to the states, may only be legitimate if they reflect something other than an exercise of general supervisory authority over state courts by the Supreme Court, because the Supreme Court has no such power. As Professor Grano explains in detail, the only tenable argument in support of exclusion of evidence in state criminal cases for the violation of a prophylactic rule is if the rule has been created out of an implied Article III authority to make procedural rulings in order to aid the Supreme Court (and other federal courts) in determining whether a violation of the Constitution itself has occurred. In short, the rules are permissible if established as a rational method--an evidentiary rule--for assessing claimed violations of the constitution. A prophylactic rule as a "conditionally mandatory" or rebuttable presumption would comport with Article III--it would provide that a showing of

certain facts (e.g. inadequate Miranda warnings) raise a presumption that a particular constitutional right has been violated, which the State can overcome with evidence on the question. But application of an exclusionary remedy for violation solely of a prophylactic rule, any evidence the State wishes to offer that the constitutional principle at stake has not itself been violated being irrelevant to the question of admission of evidence in the State's case, is to substitute the prophylactic rule for the Constitution itself.

IV. Conclusion

Conclusive presumptions flowing from prophylactic rules are substantive rules of law, and are in effect Court initiated amendments to the Constitution. Consideration of claims of violation of prophylactic rules, or prophylactic rules

designed to protect prophylactic rules, as in the instant case, or the standard of review for harmless error when a prophylactic rule (or prophylactic rule designed to protect a prophylactic rule) is violated, is simply beyond the authority of federal courts under Article III, and beyond the statutory authority of the habeas corpus statute as well (which grants jurisdiction only to inquiry "on the ground that (the petitioner) is in custody in violation of the Constitution or laws or treaties of the United States." 28 USC 2254(a)).

This Court should hold that because violation of prophylactic rules without any attendant finding of a violation of the protected constitutional principle raises no federal issue, petitions for habeas corpus raising only claims of a violation of a prophylactic rule are not cognizable, and that the question of the standard of

harmless error for violation of a prophylactic rule raises no federal question, the federal courts being without constitutional authority to order any exclusionary remedy at trial for violation of only a prophylactic rule, or to consider the consequences of the admission of evidence which was admitted in violation of only a prophylactic rule.

CONCLUSION

WHEREFORE, amicus respectfully requests that the judgment of the circuit court of appeals be affirmed.

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No. 91-7358

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BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARKANSAS, COLORADO, CONNECTICUT, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, OHIO, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

I. When the petitioner has had one full and fair opportunity to raise any *Doyle* claim in state court, should collateral review of the same claim on a federal habeas corpus petition be precluded?

II. Whether *Doyle* error should only result in reversal of a state criminal conviction on federal habeas corpus if the petitioner can demonstrate a reasonable probability of a more favorable result had the evidence been excluded?

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No. 91-7358

In The

Supreme Court of the United States

October Term, 1991

TODD A. BRECHT,

Petitioner,

v.

GORDON A. ABRAHAMSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARKANSAS, COLORADO, CONNECTICUT, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, OHIO, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI*

This case presents fundamental questions concerning the administration of justice implicated by the unique dual roles of our state and federal courts. Substantial but necessary costs are imposed during the direct review of alleged *Doyle* errors. This typically includes a complete review of the record to determine whether the State has met its burden to show that any established or presumed

error was harmless under the standard set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967). Upon the conclusion of the direct review process, collateral challenges to the presumptively valid and final state court judgment raise other important criminal justice interests in finality, comity, and judicial economy. However, under current law, *Doyle* claims may be *relitigated* on federal habeas review. Since the States must bear most of the costs of federal habeas review, *amici* States have an interest in minimizing these costs by avoiding redetermination of *Doyle* claims in federal court where a full and fair opportunity to litigate has already been furnished in state court. *Amici* also have an interest in any standard of review adopted by this Court for the collateral review of *Doyle* claims.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

On October 17, 1985, petitioner Todd A. Brecht shot his brother-in-law, who was the Wisconsin District Attorney for Buffalo County. Brecht contended the shooting was accidental. A jury found Brecht guilty of first degree murder. *Brecht v. Abrahamson*, 944 F.2d 1363, 1364 (7th Cir. 1991); *Brecht v. Abrahamson*, 759 F. Supp. 500, 502 (W.D. Wis. 1991). Brecht was sentenced to life in prison. At the state trial, four references to Brecht's post-*Miranda* silence were raised by the State, during cross-examination and closing argument. *See Brecht*, 944 F.2d at 1376; *Brecht*, 759 F. Supp. at 508. It is not disputed that these references violated *Doyle v. Ohio*, 426 U.S. 610 (1976), holding that the Fourteenth Amendment Due Process Clause forbids prosecutorial use of or comment on post-*Miranda* silence.

Following the trial, each successive state court on direct review and federal court on collateral review overturned the ruling or grant of habeas relief of the preceding court. The Wisconsin Court of Appeals reversed Brecht's conviction, concluding that the *Doyle* errors (along with other errors not in issue here) were not harmless. *State v. Brecht*, 138 Wis.2d 158, 405 N.W.2d 718, 722, 723 (Wis.Ct.App.1987). The Wisconsin Supreme Court reversed, reinstating the conviction after concluding that the due process violations under *Doyle* were harmless beyond a reasonable doubt. *State v. Brecht*, 143 Wis.2d 297, 421 N.W.2d 96, 104 (Wis.1988). The U.S. District Court granted federal habeas relief, holding, *inter alia*, that the *Doyle* errors did not constitute harmless error. *Brecht*, 759 F. Supp. at 508. The Seventh Circuit adopted a new standard for evaluating harmless error on collateral review: "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht*, 944 F.2d at 1375 (citation omitted). In employing this standard, the Seventh Circuit found the *Doyle* errors were harmless and reversed the district court's grant of habeas relief. *Id.* at 1376. This Court granted certiorari review. *Brecht v. Abrahamson*, 112 S.Ct. 2937, 119 L.Ed.2d 563 (1992).

SUMMARY OF ARGUMENT

The narrow question presented in this case concerns the appropriate standard for federal habeas review of *Doyle* claims, which are relitigated *after* a presumptively valid and final state court judgment has been entered and a full and fair opportunity to litigate has been afforded on direct review.

In *Withrow v. Williams*, No. 91-1030, this Court will decide whether the standard under *Stone v. Powell*, 428 U.S. 465 (1976) – barring federal habeas review of Fourth Amendment exclusionary rule claims where there was a "full and fair opportunity" to litigate such claims in state court – should be extended to habeas claims based upon *Miranda v. Arizona*, 384 U.S. 436 (1966). The standard and rationale adopted and employed in *Withrow* may therefore control the disposition of this case.

Alternatively, and independent of this Court's resolution in *Withrow*, *amici* urge the Court to apply the rationale of *Stone* to *Doyle* claims. The *Doyle* rule does not confer a personal constitutional right, as it is a prophylactic, judge-made remedy designed to protect *Miranda* warnings and is not dictated by the Constitution. The primary purpose of *Doyle* is to promote fairness. Yet, this fairness function is sufficiently advanced under the direct review process, which includes a thorough examination of the record under the *Chapman* harmless error standard and the possibility of review by this Court. Any incremental benefit derived from *duplicating* this litigation on collateral review cannot be warranted in light of the material costs incurred, including to the criminal justice interests in finality, comity and judicial economy. Even assuming *arguendo* that a secondary probative function is advanced by the *Doyle* rule, the costs of *relitigating* a *Doyle* claim on federal habeas review cannot be rationalized after a defendant has already had a full and fair opportunity to litigate this issue in state court. The *Doyle* rule should be ardently applied on direct review. Any marginal benefits obtained from its application on collateral review cannot be justified.

If the Court declines to extend the rationale of *Stone* to *Doyle* claims, *amici* respectfully submit that the appropriate standard of review of *Doyle* claims may be borrowed from other due process cases which have focused on the reliability and fairness of the trial. Thus, *Doyle* error would result in reversal of a state conviction on collateral review only if the habeas petitioner can demonstrate a reasonable probability of a more favorable result had the evidence been excluded. This test would offer the benefits of: uniformity; the familiarity of an established standard; and ensuring the due process focus on the reliability and fairness of the trial.

ARGUMENT

I. This Case May Be Controlled By Standards Adopted By This Court In *Withrow v. Williams*

In *Stone v. Powell*, this Court held that Fourth Amendment exclusionary rule claims should be barred on federal habeas review "absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and in direct review." 428 U.S. at 495 n.37. In *Withrow v. Williams*, No. 91-1030, which will also be heard during the 1992 Term, the central question presented is whether the rationale of *Stone* should extend to claims alleging violations of the *Miranda* exclusionary rule, where a full and fair opportunity to litigate the claim has already been provided in state court. *See Miranda v. Arizona*, 384 U.S. 436 (1966). The disposition of this case may therefore be governed by the standard and rationale adopted by this Court in *Withrow v. Williams*, 112 S.Ct. 1664, 118 L.Ed.2d 386 (1992) (certiorari granted).

In *Brecht*, the Seventh Circuit expressly noted the possibility of extending the *Stone* standard to *Doyle* claims based upon the close relation between *Doyle* and *Miranda* claims. *See Brecht*, 944 F.2d at 1371-72 ("If *Miranda* ultimately joins the [Fourth Amendment] exclusionary rule, claims under *Doyle* are logical companions, for just as *Miranda* creates a buffer around the self-incrimination clause, so *Doyle* creates a buffer around *Miranda*."). However, instead of directly considering the extension of *Stone*, the Seventh Circuit adopted a modified harmless error analysis as a "middle ground." *Brecht*, 944 F.2d at 1373.

As noted by thirty-six States as *amici curiae* in *Withrow*, any incremental benefits of reviewing *Miranda* claims on collateral review are outweighed by substantial and unjustifiable costs to our criminal justice system. *See* Brief *Amicus Curiae* of States in Support of Petitioner, *Withrow v. Williams*, No. 91-1030, at 9-22; *see also Duckworth v. Eagan*, 492 U.S. 195, 212 (1989) (O'Connor, J., concurring) ("If *Stone v. Powell* bars relitigation of allegations of constitutional violations on federal habeas, it seems to me clear that its rationale is directly applicable to relitigation of nonconstitutional claims under *Miranda*."). As noted below, the existence of the *Doyle* rule is entirely dependent upon the *Miranda* rule. *See* notes 2 to 3, *infra*, and accompanying text. If in *Withrow* this Court extends the *Stone* standard to claims asserted under the prophylactic *Miranda* rule, then the *Stone* standard and rationale should similarly apply to claims based upon the prophylactic *Doyle* rule.

II. Independent of this Court's Disposition in *Withrow*, The *Stone v. Powell* Standard Should Extend To *Doyle* Claims

In *Greer v. Miller*, 483 U.S. 756, 765 n.6 (1987), this Court noted a significant open issue affecting the administration of justice: "whether *Doyle* errors may be viewed differently on collateral attack from on direct review." In the event the Court does not extend the *Stone* standard to *Miranda* claims in the *Withrow* case (i.e., *Withrow* is resolved on alternative grounds), then this case still presents an opportunity to resolve this open issue.[1] In answering the open question, a compelling argument can be made for the extension of the *Stone* standard to *Doyle* claims.

A. The Prophylactic *Doyle* Rule Does Not Confer A "Personal Constitutional Right"

One important facet of the *Stone* holding is that the Fourth Amendment exclusionary rule "is not a personal constitutional right" since it is a judge-made remedy "designed to safeguard Fourth Amendment rights." *Stone*, 428 U.S. at 486 (citation omitted); *id.* at 495 n.37; *see also Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (noting this "crucial" distinction made in *Stone*). The *Doyle*

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[1] Justice Stevens has already written that *Doyle* errors should be reviewed on direct review but has questioned whether they should be subject to collateral review. *See Greer*, 483 U.S. at 768-69 (Stevens, J., concurring). In *Brecht*, the Seventh Circuit also recognized some "deferential standard" is appropriate for collateral review of *Doyle* claims in order to avoid duplicating the litigation of claims already considered on direct review. *See Brecht*, 944 F.2d at 1372.

rule, a judicially-established standard intended to safeguard the *Miranda* warning, satisfies this part of the *Stone* opinion.

The role of the *Doyle* rule, premised on the Due Process Clause of the Fourteenth Amendment, can only be understood within the context of the *Miranda* exclusionary rule, based upon the Fifth Amendment. The opinions of this Court make clear that the *Doyle* rule is inextricably linked to the *Miranda* rule. This Court has "consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him" through the *Miranda* warnings. *Fletcher v. Weir*, 455 U.S. 603, 606 (1982) (per curiam). Because "the 'implicit assurance' of *Miranda* warnings" serves as a recognized "*prerequisite* [for] a *Doyle* violation," *Greer*, 483 U.S. at 763 (emphasis added), it is indisputable that but for *Miranda* there would be no raison d'etre for *Doyle*. As the Seventh Circuit noted in *Brecht*, "*Doyle* is . . . a prophylactic rule designed to protect another prophylactic rule [*Miranda*] from erosion or misuse." *Brecht*, 944 F.2d at 1370.[2]

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[2] Other cases and commentators have discussed the direct dependence of *Doyle* on *Miranda*. *See, e.g., Wainwright v. Greenfield*, 474 U.S., 284, 290 (1986) ("The *source* of the unfairness [in *Doyle*] was the implicit assurance contained in the *Miranda* warnings. . . . The *critical importance* of the implied promise that is conveyed to the arrested person by the *Miranda* warnings has been repeatedly confirmed in subsequent decisions.") (emphasis added; footnote omitted); *United States v. Stubbs*, 944 F.2d 828, 834 n.1 (11th Cir. 1991) (noting "there can be no *Doyle* violation until after a person is given *Miranda* warnings and the assurances implicit therein"), *cert. denied*, 495 U.S. 959 (1990); *Grancorvitz v. Franklin*, 890 F.2d 34, 42 (7th Cir. 1989) ("Since the due process right established in *Doyle* is dependent upon the government giving assurances to an individual, such as those given under the *Miranda* warnings, the individual must be invoking the rights inherent in those assurances."), *cert. denied*, 495 U.S. 959 (1990); *Phelps v. Duckworth*, 772 F.2d 1410, 1418 (7th Cir. 1985) (en banc) (Posner, J., concurring) (noting "*Doyle* . . . depends just on *Miranda*"), *cert. denied*, 474 U.S. 1011 (1985); Note, *Protecting* Doyle *Rights After* Anderson v. Charles*: The Problem of Partial Silence*, 69 Va. L. Rev. 155, 164 (1983) [hereinafter *Protecting* Doyle *Rights*] (describing *Miranda* warnings as the *sine qua non* of any *Doyle* inquiry); *see also Doyle*, 426 U.S. at 617 (concluding "the *Miranda* decision compels rejection of the State's position" to permit use of post-arrest silence for impeachment purposes).

Silence in other contexts lacking the *Miranda* warnings may be used as evidence. *See, e.g., South Dakota v. Neville*, 459 U.S. 553, 564-65 (1983) (refusal to submit to blood-alcohol test may be used as evidence and is distinguishable from *Doyle*); *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980) (pre-*Miranda* silence may be used for impeachment since "no governmental action induced petitioner to remain silent before arrest"); *Roberts v. United States*, 445 U.S. 552, 561 (1980) (holding "the post-conviction, presentencing silence of the defendant did not resemble 'postarrest silence that may be induced by the assurances contained in *Miranda* warnings' ") (as quoted in *Fletcher*, 455 U.S. at 606).

Some commentators have suggested any insoluble ambiguity implied by *Miranda* warnings could be cured by modifying the warnings. *See, e.g., The Law of Pretrial Interrogation*, 22 U. Mich. J. L. Ref. 437, 530 & n.273, 555, 563 (1989) [hereinafter *Pretrial Interrogation*]; *Adverse Inferences From Silence*, 22 U. Mich. J. L. Ref. 1005, 1116 & n.317 (1989) [hereinafter *Adverse Inferences*]; *Protecting* Doyle *Rights*, *supra*, at 162 n.38; *The Supreme Court, 1979 Term*, 94 Harv. L. Rev. 75, 86 (1980) [hereinafter *1979 Term*] (discussing possible "silence warning").

It is true that *Doyle* relies upon the Fourteenth Amendment – a separate constitutional basis than that supporting the *Miranda* rule. *See, e.g., Wainwright*, 474 U.S. at 291. Yet as this Court has observed with regard to

the *Doyle* rule, " 'absen[t] the sort of affirmative assurances embodied in the *Miranda* warnings,' the Constitution does not prohibit the use of a defendant's postarrest silence to impeach him at trial." *Greer*, 483 U.S. at 763 (quoting *Fletcher*, 455 U.S. at 607); *see also Wainwright*, 474 U.S. at 291 n.6 (citing cases to show that the existence of *Doyle* is based wholly upon *Miranda*). Therefore, if *Doyle* may be deemed a personal constitutional right at all, it must be as a derivative to the *Miranda* rule. However, it is well-recognized that the judicially established, prophylactic *Miranda* rule is not compelled by the Fifth Amendment. In other words, the mere failure to comply with the *Miranda* requirements does not automatically establish a violation of the Fifth Amendment.[3] Moreover, this Court has already noted that *Doyle* is not predicated on the Fifth Amendment.[4] Just as the Fourth Amendment

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[3] *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."); *see also Duckworth*, 492 U.S. at 209 (O'Connor, J., concurring) ("The *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself."); *New York v. Quarles*, 467 U.S. 649, 654 (1983); *Doyle*, 426 U.S. at 617 (noting the *Miranda* warnings are "a prophylactic means of safeguarding Fifth Amendment rights"); *Michigan v. Tucker*, 417 U.S. 433, 444-46 (1974); *Brecht*, 944 F.2d at 1370 ("[T]he warnings required by *Miranda* are not themselves part of the Constitution."); *United States ex rel. Miller v. Greer*, 789 F.2d 438, 449 (7th Cir. 1986) (en banc) (Easterbrook, J., dissenting) (same), *rev'd on other grounds*, 483 U.S. 756 (1987).

[4] *See Wainwright*, 474 U.S. at 291 n.7; *see also Doyle*, 426 U.S. at 618; *Brecht*, 944 F.2d at 1368; *Phelps*, 772 F.2d at 1422 (Easterbrook, J., concurring) ("[A] prosecutor's thwarted effort to violate *Doyle* is removed three times from the constitutional

exclusionary rule and *Miranda* exclusionary rule are not *mandated* by the Constitution, *Doyle* similarly is not *dictated* by the Constitution.

Clearly, then, the *Doyle* rule is not a personal constitutional right, within the meaning of *Stone*.[5] Consequently, *Doyle* claims arguably fail to meet the jurisdictional prerequisite for federal habeas review. In asserting claims based upon the prophylactic judge-made *Doyle* rule, state prisoners cannot establish that their "custody" is a result of a "violation of the *Constitution* or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added); *see also Phelps*, 772 F.2d at 1416 (Posner, J., concurring) ("The chain is too long and has too many weak links to provide a firm basis for federal judicial intervention in the criminal process of the states in [such *Doyle*] case[s]. . . . "); *accord Estelle v. McGuire*, 502 U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385, 396 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.").

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prohibition of compulsory self-incrimination."); *accord Jenkins*, 447 U.S. at 236-37 (noting *Raffel v. United States*, 271 U.S. 494 (1926) "explicitly rejected the contention that the possibility of impeachment by prior silence is an impermissible burden upon the exercise of Fifth Amendment rights.").

[5] At least one court has intimated that the *Doyle* rule is a personal constitutional right. But this proposition was reached in a conclusory manner, failing to undertake the analysis applied in *Stone* to the analogous prophylactic, judge-made Fourth Amendment exclusionary rule. *See Miller*, 789 F.2d at 445 (suggesting, without analysis or explanation, a *Doyle* violation "is constitutional and personal to the petitioner"), *rev'd on other grounds*, 483 U.S. 756 (1987).

B. Any Incremental Benefits of Reviewing *Doyle* Claims On Collateral Review Are Outweighed by Substantial Costs to our Criminal Justice System

In applying the *Stone* rationale, to determine whether federal habeas review should be available for *Doyle* claims, the utility of the rule must be weighed against the costs of extending it to collateral review. *See Stone*, 428 U.S. at 489; *see also Duckworth*, 492 U.S. at 208 (O'Connor, J., concurring). Stated another way, the issue is whether *Doyle* claims should be permitted as a collateral challenge to a presumptively final and valid state court judgment, *see Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), when there has *already* been a full and fair opportunity to litigate the claim on direct review.

1. Fairness Function

The principle objective of *Doyle* is fairness. The *Doyle* rule precludes any fundamental unfairness that *may* result when a prosecutor uses a defendant's silence as evidence after the defendant received the implicit assurance of the *Miranda* warning that the exercise of silence would not be punished. *See, e.g., Wainwright*, 474 U.S. at 289-90, 292; *Doyle*, 426 U.S. at 618; *see also Brecht*, 944 F.2d at 1370 (The *Doyle* rule "has nothing to do with the defendant's guilt and everything to do with insisting that the government play straight with those it prosecutes."); *Miller*, 789 F.2d at 449 & n.2 (Easterbrook, J., dissenting) (same).

Significantly, the fairness function of *Doyle* is adequately promoted and satisfied under the direct review process. During the state trial – traditionally considered

the "main event" in our criminal justice system, *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) – any prosecutorial effort to impeach a defendant with his post-*Miranda* silence or call attention to this silence may be challenged or mitigated in several manners by defense counsel. This includes: (1) a motion for a mistrial; (2) an immediate objection which may preclude the submission of any post-*Miranda* silence evidence to the jury, *see, e.g., Greer*, 483 U.S. at 764-65; or (3) a curative instruction. *See id.* at 766 n.8 (noting "trial counsel bore primary responsibility for ensuring that the [attempted *Doyle*] error was cured in the manner most advantageous to his client"); *see also Miller*, 789 F.2d at 449 & n.2 (Easterbrook, J., dissenting) (noting curative role that defense counsel may play).[6] As a first line of defense, any of these recognized avenues, if pursued, will be subject to resolution by the trial judge. Even where there is no technical *Doyle* violation, the prosecutor's actions might be scrutinized under the Due Process Clause on grounds of prosecutorial misconduct. *See, e.g., Greer*, 483 U.S. at 765-67.

On appeal, the fairness function is further promoted on several potential levels, as the entire trial record may be examined and reexamined. *First*, the appellate court will determine whether a *Doyle* violation in fact occurred. If so, then the appellate court will decide whether the error constitutes harmless error under the standard established in *Chapman v. California*, 386 U.S. 18 (1967). Significantly, under the *Chapman* standard, the State bears the

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[6] Where a *Doyle* objection is not raised, review in federal court on federal cases is under the plain error standard. *See, e.g., United States v. Carter*, 953 F.2d 1449, 1466 (5th Cir.), *cert. denied*, 112 S.Ct. 2980, 119 L.Ed.2d 598 (1992); *United States v. Cardenas Alvarado*, 806 F.2d 566, 573 (5th Cir. 1986).

burden to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24.[7] *Second*, any ruling by an intermediate appellate state court, as here, may be reviewed by the state's highest court, entailing the same two-step process.[8] *Finally*, any ruling by the state supreme court may be subject to direct review by this Court. *See* 28 U.S.C. § 1257 (appellate jurisdiction over cases arising in state court). In fact, many of the *Doyle* line of cases have been established by this Court on direct review.

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[7] The *Chapman* standard also applies to Fourth Amendment exclusionary rule and *Miranda* exclusionary rule claims considered on direct review. *See, e.g., United States v. Modarressi*, 886 F.2d 6, 7-8 (1st Cir. 1989) (*Chapman* standard applied to alleged Fourth Amendment claim); *United States v. Chapman*, 866 F.2d 1326, 1334-35 (11th Cir.) (same), *cert. denied*, 493 U.S. 932 (1989); *United States v. Troise*, 796 F.2d 310, 314 (9th Cir. 1986) (*Chapman* standard applied to alleged *Miranda* violation); *People v. Ratliff*, 41 Cal.3d 675, 688, 224 Cal.Rptr. 705 (Cal.1986) (*Chapman* standard applied to alleged Fourth Amendment claim); *People v. Enriquez*, 19 Cal.3d 221, 239, 137 Cal.Rptr. 171 (Cal.1977) (*Chapman* standard applied to *Miranda* violation).

[8] This multi-level state judicial review comports with the primary role of state courts in our federal criminal justice system and their co-equal status and ability with the federal judiciary to apply federal principles. *See Sawyer v. Smith*, 497 U.S. 227, ___, 110 S.Ct. 2822, 2831, 111 L.Ed.2d 193, 210-11 (1990); *Swain v. Pressley*, 430 U.S. 372, 383 (1977); *Stone*, 428 U.S. at 493 n.35; *see also Rose v. Mitchell*, 443 U.S. 545, 579-80 (1979) (Powell, J., concurring); *Palmore v. United States*, 411 U.S. 389, 407, 410 (1973); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 451, 509 (1963) [hereinafter Bator, *Finality in Criminal Law*]. It is well-recognized that the primary obligation for the definition and enforcement of criminal laws in our federalism form of government resides with the States. *See Engle v. Isaac*, 456 U.S. 107, 128 (1982); *Palmore*, 411 U.S. at 402.

The record shows that petitioner Brecht received a full and fair hearing of his *Doyle* claims before the state trial, appellate and supreme courts. Moreover, these claims were fully examined and assessed on direct review under the harmless error analysis. Relitigation of this issue on collateral review comes at a substantial price and cannot be justified in terms of any incremental benefit obtained by advancing the fairness function through, as here, three more duplicative rounds of litigation on federal habeas review.

2. Impact on Truth-Seeking Process

Another concern noted by the *Stone* Court was the impact of the Fourth Amendment exclusionary rule on the truth-finding process. *Stone*, 428 U.S. at 490. As applied to *Doyle*, the issue is whether the application of the rule on collateral review contributes if at all to the truth-seeking process. First, we must consider whether there is any probative utility from using post-*Miranda* silence.

Common law has long recognized the probative value of impeaching an individual by their silence.[9] The prophylactic *Doyle* rule does not apply until *Miranda* warnings are given, usually following an arrest. However, subsequent cases have recognized several qualifications to the *Doyle* rule, thereby *acknowledging the legitimate evidentiary use of silence in many similar contexts*. For example, *prearrest* silence may constitutionally be used for impeachment purposes. *See Fletcher*, 455

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[9] *See Jenkins*, 447 U.S. at 239; *see also Fletcher*, 455 U.S. at 607 (noting state evidentiary law may govern the ability of prosecutors to comment on postarrest, pre-*Miranda* silence); *Jenkins*, 447 U.S. at 239 n.5 (noting probative role of prearrest silence "is a question of state evidentiary law"); *Raffel v. United States*, 271 U.S. 494 (1926) (impeachment of silence at prior trial permitted in second trial); *cf. Neville*, 459 U.S. at 564-65 (refusal to submit to blood-alcohol test may be used as probative evidence).

U.S. at 604 n.1; *Jenkins*, 447 U.S. at 240; *see also Stubbs*, 944 F.2d at 834 n.1.[10]

As to *postarrest* silence, *Doyle* does not establish an automatic or absolute rule precluding every reference to such silence. For example, where an arrest has been made but no *Miranda* warnings have been given, no governmental inducement or assurance has been afforded the defendant that postarrest silence will be protected and a defendant who chooses to testify may be cross-examined on the postarrest silence. *Fletcher*, 455 U.S. at 606-07; *see also Roberts*, 445 U.S. at 561; *Raffel*, 271 U.S. at 496-97. Even *Doyle* recognized that postarrest silence may be used "to challenge the defendant's testimony as to his behavior following arrest."[11] Prosecutors

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[10] This Court has considered and rejected the argument that "an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent." *Fletcher*, 455 U.S. at 606.

Although many cases discuss the *Doyle* rule in the context of "prearrest" and "postarrest," *Doyle* unquestionably rests on the implied assurance of the *Miranda* warning. *See* note 2, *supra*, and accompanying text. In light of this precedent, acknowledging the dispositive role of the implied assurance of *Miranda* warnings on *Doyle* claims, it would be more accurate to refer to "pre-*Miranda* and "post-*Miranda*" silence.

As this Court has explained, post-*Miranda* silence "does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." *Wainwright*, 474 U.S. at 295 n.13.

[11] *Doyle*, 426 U.S. at 619 n.11 (noting "the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest"); *see also Leecan v. Lopes*, 893 F.2d 1434, 1441-42 (2d Cir.) (*Doyle* footnote 11 exception found applicable), *cert. denied*, 496 U.S. 929 (1990); *Nichols v. Wainwright*, 783 F.2d 1540, 1543 (11th Cir.) (same), *cert. denied*, 479 U.S. 840 (1986).

may use postarrest silence which "merely inquires into prior inconsistent statements."[12]

While *Doyle* "bars the *use* for impeachment purposes' of a defendant's postarrest silence," there is no *Doyle* violation where the prosecutor is not permitted to call attention to the silence or use the silence for impeachment purposes. *Greer*, 483 U.S. at 763, 764 (emphasis in original).[13] Finally, in some situations, questions may be "carefully framed" to avoid reference to the exercise of silence while permitting other evidentiary objectives to be pursued. *Wainwright*, 474 U.S. at 295.

Even prior to these clarifications and qualifications of the *Doyle* rule, this Court explicitly noted in *Doyle* that it was not "necessary . . . to express an opinion on the

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[12] *Anderson v. Charles*, 447 U.S. 404, 408 (1980) (per curiam) ("[A] defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all."); *see also United States v. Diaz*, 961 F.2d 1417, 1418-19 (9th Cir. 1992) (applying *Anderson* rule); *Smith v. Cadagin*, 902 F.2d 553, 558-59 (7th Cir.) (same), *cert. denied*, 111 S.Ct. 177, 112 L.Ed.2d 141 (1990).

Others have also noted that silence may constitute a prior inconsistent statement. *Doyle*, 426 U.S. at 622 (Stevens, J., dissenting); *see also Miller*, 789 F.2d at 449-51 (Easterbrook, J., dissenting); *accord Jenkins*, 447 U.S. at 245 n.8.

[13] *See also Stubbs*, 944 F.2d at 834-35 (holding no *Doyle* violation occurred under the *Greer* standard); *Lindgren v. Lane*, 925 F.2d 198, 200-01 (7th Cir.) (same), *cert. denied*, 112 S.Ct. 105, 116 L.Ed.2d 74 (1991); *United States v. Ramos*, 932 F.2d 611, 617 n.10 (7th Cir. 1991) (same); *United States v. Lane*, 883 F.2d 1484, 1494-95 (10th Cir. 1989) (same), *cert. denied*, 493 U.S. 1059 (1990); *accord Wainwright*, 474 U.S. at 295 ("What is impermissible is the *evidentiary use* of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized.") (emphasis added).

probative value for impeachment purposes of petitioners' [post-*Miranda*] silence." *Doyle*, 426 U.S. at 618 n.8.[14] More recently, this Court has observed, in apparent agreement

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[14] Some cases have questioned the probative role of post-*Miranda* silence under the *Doyle* rule. *See, e.g., Bass v. Nix*, 909 F.2d 297, 305 n.14 (8th Cir. 1990) (noting that "the *Doyle* rule is, at its heart, concerned with the ability of the adversarial system to find the truth" and concluding that the harmless-beyond-a-reasonable doubt standard should apply on collateral review); *Miller*, 789 F.2d at 444 n.4 ("Silence after a state authority has promised that any statement one makes may be used at trial surely has questionable probative value."); *Phelphs v. Duckworth*, 757 F.2d 811, 819 (7th Cir.), *vacated*, 772 F.2d 1410 (7th Cir. 1985) (en banc), *cert. denied*, 474 U.S. 1011 (1985); *accord United States v. Hale*, 422 U.S. 171, 177 (1975) (pre-*Doyle* case based upon supervisory authority over lower federal courts). However, these cases have not taken into account the more recent decisions of this Court, as recognized by others. *See* note 15, *infra*; *see also Brecht*, 944 F.2d at 1376 (criticizing *Bass* as "rest[ing] on a misunderstanding of the justification of the *Doyle* rule").

The doubt on the probative utility of post-*Miranda* silence was initially predicated upon the divergent possible constructions of this silence. In *Doyle*, 426 U.S. at 617, this Court noted that "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Cf. Hale*, 422 U.S. at 180 (supervisory authority over lower federal courts).

Others have taken strong exception. *See, e.g., Doyle*, 426 U.S. at 621-26 (Stevens, J., dissenting) (noting the mere giving of a *Miranda* warning does not "lessen[] the probative value" of silence at the time of arrest); *Hale*, 422 U.S. at 181 (Burger, C.J., concurring); *Brecht*, 944 F.2d at 1369 ("That silence can carry multiple messages does not make the ambiguity *insoluble*. Few pieces of evidence standing alone support confident conclusions.") (emphasis in original); *Phelps*, 772 F.2d at 1416 (Posner,

with others, that any probative basis under *Doyle* and its progeny is *secondary* to the fairness function (under the implied assurance rationale).[15]

Even assuming *arguendo* that any probative rationale which may have originally supported the *Doyle* rule survives today, the critical question is whether any incremental benefit from relitigation of a *Doyle* claim on collateral review can be justified in light of the substantial costs entailed by this review. As already noted, the direct review process furnishes ample opportunity to litigate these issues. There certainly are diminishing returns to applying a prophylactic judge-made rule on collateral review when the issue has already been fully and fairly considered on direct review.

Moreover, where habeas relief is granted, the outcome and accuracy of a second state trial may turn on the reliability and availability of any remaining evidence. As Justice Harlan wrote, the "very act of trying stale facts may

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J., concurring); *Pretrial Interrogation*, *supra* note 2, at 561-63; *Adverse Inferences*, *supra* note 2, at 1061-62, 1068-78, 1086-89.

It should be acknowledged that any doubts over the probative utility of post-*Miranda* silence are entirely predicated on a *presumption* that the silence was induced by reliance on the *Miranda* warning. Justice Stevens recognized this in *Doyle* and concluded that such a presumption was not necessary since the defendant, on cross-examination, has the opportunity to explain whether the silence was induced by the *Miranda* warning. *See Doyle*, 426 U.S. at 624-26 (Stevens, J., dissenting).

[15] *See Wainwright*, 474 U.S. at 294 n.12. It is now widely recognized that subsequent decisions of this Court have reduced or eliminated any force that any probativeness rationale may have initially had. *See, e.g., Miller*, 789 F.2d at 451 (Easterbrook, J., dissenting); *Phelps*, 772 F.2d at 1422 (Easterbrook, J., concurring); *Protecting* Doyle *Rights*, *supra* note 2, at 167 nn. 37 & 38, 165 n.56; *1979 Term*, *supra* note 2, at 86; *see also Brecht*, 944 F.2d at 1368.

well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first." *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring and dissenting); *see also McCleskey v. Zant*, 499 U.S. ___, 111 S.Ct. 1454, 1468, 113 L.Ed.2d 517, 542 (1991); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 147 (1970) [hereinafter Friendly, *Is Innocence Irrelevant?*]. The potential problem of "stale" facts is a real one in this case. The shooting in issue occurred nearly seven years ago, on October 17, 1985.[16]

In sum, it is clear that any prosecutor who flirts with a *Doyle* error incurs a real and substantial risk of losing a possible conviction. Not only are there several avenues available to defense counsel to attempt to cure or challenge any alleged *Doyle* violation, but there are also multiple opportunities for thorough judicial scrutiny during the direct review process, including to this Court. If a *Doyle* violation is established, the State then holds the burden, under the *Chapman* standard, to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. Against this background, *Amici* respectfully submit that the dispositive question for petitioner to answer here is how the administration of justice is advanced by a new and duplicative round of *Doyle* litigation on federal habeas review and at what price to other important criminal justice values.

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[16] The primary objective of the *Miranda* exclusionary rule is to deter police conduct that may lead to a potential constitutional violation. *See, e.g., Elstad*, 470 U.S. at 308; *Oregon v. Haas*, 420 U.S. 714, 722-23 (1975); *Tucker*, 417 U.S. at 446-47. While *Doyle* safeguards the *Miranda* rule, *Doyle* cannot be said to *directly* promote the central purpose of the *Miranda* rule. *Miranda* deals with police conduct *before* trial; *Doyle* focuses on prosecutorial conduct *at* trial.

3. The Substantial Costs of Habeas Review

This Court has already noted the substantial, and often necessary, costs of relitigation during the direct review process.[17] Application of the *Chapman* harmless error standard already constitutes an acknowledgment that even on direct review not all *Doyle* errors should result in reversal of conviction. *See also* note 6, *supra* (discussing plain error rule). Yet, harmless error review also entails its own necessary costs, including scrutiny of

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[17] In the context of harmless error analysis, this Court has observed:

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. The passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. Thus, while reversal may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution, and thereby cost society the right to punish admitted offenders. Even if a defendant is convicted in a second trial, the intervening delay may compromise society's interest in the prompt administration of justice, and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.

United States v. Mechanik, 475 U.S. 66, 72 (1986) (citations and internal quotations omitted).

the entire record and the possibility of undermining the jury's role during the "main event."

These costs are essential to the fairness and accuracy of the direct review process. However, these same costs are multiplied manifold by *duplicative* proceedings on collateral review, where a presumptively valid and final state court judgment is being challenged. *Barefoot*, 463 U.S. at 887. Moreover, once a presumptively valid state court judgment has been entered, *separate* criminal justice values and interests must be taken into account in considering the proper scope of collateral review in our federalism system. *See, e.g., Duckworth*, 492 U.S. at 209-10 (O'Connor, J., concurring) ("While this balance of interests may be perfectly justified in the context of direct review of criminal convictions, . . . the balance shifts when applied to a presumptively final criminal judgment which is collaterally attacked in a federal habeas corpus proceeding.").

As this Court has aptly recognized, "*most of the price* paid for federal review of state prisoner claims is *paid by the States*," *Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 2559, 115 L.Ed.2d 640 (1991) (emphasis added). Some of the significant costs of habeas review include: the record or practice of some federal habeas courts to disregard or disrespect the co-equal status of state courts, their ability to apply the *Doyle* rule, and the state court's rulings; an intrusion into matters of State sovereignty and a disregard of comity interests;[18] an unnecessary

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[18] *See, e.g., McCleskey*, 499 U.S. at ___, 111 S.Ct. at 1469, 113 L.Ed.2d at 543 (discussing intrusion into state sovereignty interests); *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality opinion); *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982) (noting comity interest); *Stone*, 428 U.S. at 491 n.31; *see also* note 8, *supra* (discussing primary role of state courts in our national judicial system).

consumption of limited judicial resources;[19] a lack of repose in the enforcement of presumptively valid state court convictions;[20] and an undermining of public confidence in the ability of our criminal justice system to resolve primary criminal justice disputes.[21] Not only does relitigation of the prophylactic *Doyle* rule on federal habeas review come at a substantial and unjustifiable cost

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[19] *See, e.g., Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1719, 118 L.Ed.2d 318, 329 (1992); *McCleskey*, 113 L.Ed.2d at 543 (noting "heavy burden on scarce federal judicial resources" which impacts the ability "of the system to resolve primary disputes"); *Stone*, 428 U.S. at 491 n.31 (noting impact of habeas review on "the most effective utilization of limited judicial services"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 261 (1973) (Powell, J., concurring) ("After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication.").

[20] *See, e.g., McCleskey*, 499 U.S. ___, 111 S.Ct. at 1468, 113 L.Ed.2d at 542 ("Neither innocence nor just punishment can be vindicated until the final judgment is known."); *see also Teague*, 489 U.S. at 309; *Stone*, 428 U.S. at 491 n.31; *Mackey*, 401 U.S. at 690-91 (Harlan, J., concurring and dissenting); Friendly, *Is Innocence Irrelevant?*, at 147; Bator, *Finality in Criminal Law, supra* note 8, at 450-51.

[21] Each of these criminal justice costs in the context of collateral review is fully considered in the Brief *Amicus Curiae* of States in Support of Petitioner, *Withrow v. Williams*, No. 91-1030, at 12-22, and will not be repeated here. *See also Brecht*, 944 F.2d at 1373 (noting costs of collateral review of *Doyle* claims, including the criminal justice interests in federalism and finality; delay caused by a new trial; and use of limited federal judicial resources).

but it also entails diminishing returns to the primary fairness objective. *See, e.g., Brecht*, 944 F.2d at 1374 (noting "the marginal benefits and costs of enforcement" of the *Doyle* rule on federal habeas review); *see also Miller*, 789 F.2d at 450 (Easterbrook, J., dissenting) ("The enforcement of prophylactic rules [such as *Doyle*] is a matter of costs and benefits."). In light of the remoteness in time in applying the *Doyle* rule on collateral review from the underlying events in issue, any grant of relief on habeas review will be seen more as a stroke of "lightening" and will be unlikely to influence state policy or prosecutorial conduct. *See Duckworth*, 492 U.S. at 211 (O'Connor, J., concurring); *Miller*, 789 F.2d at 452 (Easterbrook, J., dissenting).

"As in the case of any remedial device, 'the application of the rule [should be] restricted to those areas where its remedial objectives are thought most efficaciously served.' " *Stone*, 428 U.S. at 486-87 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). The Fourth Amendment exclusionary rule under *Stone*, just like the *Miranda* exclusionary rule and the *Doyle* rule, are all prophylactic, judicially created remedies. Each rule is exclusionary in that it precludes the admission of certain evidence. Each of these rules should be vigorously enforced on direct review; the cost of their application on collateral review, however, cannot be justified. For these reasons, the *Stone v. Powell* standard and rationale best balance the competing criminal justice interests at stake and minimize the costs to our criminal justice system of relitigating *Doyle* claims on collateral review.

III. *Doyle* Error Should Result In Reversal Of A State Criminal Conviction On Federal Habeas Corpus Only If The Petitioner Can Demonstrate A Reasonable Probability Of A More Favorable Result Had The Evidence Been Excluded

Assuming the Court does not accept, or does not reach, our argument that *Doyle* violations should not be cognizable on habeas corpus, it must then decide the appropriate standard of review for such errors. The Wisconsin Supreme Court found that the *Doyle* error was harmless beyond a reasonable doubt. *Brecht*, 143 Wis.2d 297, 421 N.W.2d at 104. The district court relied upon the same standard, but found the error prejudicial. *Brecht*, 759 F.Supp. at 507-508. The Seventh Circuit concluded that the reasonable doubt standard of *Chapman v. California*, 386 U.S. 18 (1967), should not be applied to collateral review of *Doyle* claims, choosing instead to focus on "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht*, 944 F.2d at 1375 (citation omitted). Although we agree with the circuit court that *Chapman* should not apply to review of *Doyle* claims on habeas corpus, *amici* believe that no form of "harmless error" analysis is appropriate. Rather, we submit that *Doyle* error is reversible only if there is a reasonable probability that, had the evidence been excluded, the result of the proceeding would have been different. *Cf. Greer*, 483 U.S. at 767-769 (Stevens, J., concurring in judgment) (concluding on direct appeal *Doyle* error should be tested under the *Chapman* standard; collateral review should determine only whether trial was fundamentally fair despite the error).[22]

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[22] The Court granted certiorari in *Greer* to decide this precise issue, 483 U.S. at 761 n.3, but found it unnecessary to do so

In *Doyle* the Court held that it would be "fundamentally unfair and a deprivation of due process" to allow a defendant's silence to be used against him after he had been advised of his *Miranda* rights and impliedly assured that his silence could not be used against him. 426 U.S. at 618. As emphasized in subsequent cases, impeachment with post-*Miranda* silence "is an affront to the fundamental fairness that the Due Process Clause requires." *Wainwright*, 474 U.S. at 291. Thus it is clearly not the use of the defendant's *silence* which is unfair, but only the manner in which that silence was induced. *See Brecht*, 944 F.2d at 1369-70.

A criminal defendant is denied due process by a trial court's "failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941). When attempting to define fundamental fairness, however, "constitutional line drawing . . . is necessarily imprecise." *Donnelly v. DeCristoforo*, 416 U.S. 637, 645 (1974). The Court has nevertheless emphasized that alleged due process violations are not reviewed under a harmless error analysis. *Darden v. Wainwright*, 477 U.S. 168, 183, n.15 (1986). Rather, the question of error subsumes the question of prejudice. If the defendant's trial was fundamentally unfair, he was necessarily prejudiced and is thus entitled to a new trial. Similarly, even if errors occurred, if the trial as a whole was fair, the conviction should be affirmed. *See United States v. Agurs*, 427 U.S. 97, 112-113 (1976). While the fundamental fairness inquiry under the Due Process Clause is less

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when it determined that there were no *Doyle* violations. *Id.* at 764-65 & n.6. While we necessarily focus on collateral review, the test we propose reasonably should apply on direct review as well. That issue, however, is not before the Court and need not be decided in this case.

"demanding" than the harmless-error standard of *Chapman*, *see Greer*, 483 U.S. at 765 n.7, the Court has yet to provide a test for determining when due process has been violated. Recent decisions suggest an appropriate formulation.

The "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Thus, the Court's "cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review." *Teague*, 489 U.S. at 313; *see also Murray v. Carrier*, 477 U.S. 478 (1986) (a showing of factual innocence may allow review of an otherwise defaulted claim); *Strickland v. Washington*, 466 U.S. 668 (1984) (a defendant is prejudiced by ineffective counsel only if the attorney's actions undermine the reliability of the judgment); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873-874 (1982) (deportation of potential defense witnesses will not violate due process unless there is a reasonable likelihood that the witness could have affected the judgment of the trier of fact); *Manson v. Brathwaite*, 432 U.S. 98 (1977) (a suggestive identification procedure will not violate due process unless the identification is unreliable); *Agurs*, 427 U.S. at 112 (the materiality of evidence which prosecution should have disclosed must reflect the Court's "overriding concern with the justice of the finding of guilt").

Based upon its concern for the reliability of the trial, the Court developed a test for determining the materiality of evidence which should have been disclosed by the prosecutor pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Such evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have

been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 685 (1985) (Blackman, J. and White, J., concurring in part and concurring in the judgment); *accord Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). The *Bagley* test was built upon a series of cases, most of which dealt exclusively with due process violations, and all of which were concerned with the reliability of the trial.

The Court first considered the appropriate test for reviewing *Brady* violations in *Agurs*.[23] Omitted evidence could be considered material, and thus subject to disclosure, only if it created a reasonable doubt about guilt. 427 U.S. at 112-113. This test emphasized the Court's focus on the fairness of the defendant's trial. *Id.* at 108.

The fairness of the trial was again highlighted in *Valenzuela-Bernal*, another Fifth Amendment due process case. The Court held that the government's deportation of a potential defense witness would justify sanctions "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." 458 U.S. at 874. Such an evaluation is best made in light of the entire trial record. *Id.* & n.10 (citing *Agurs*).

The key to both *Agurs* and *Valenzuela-Bernal* was concern for the reliability of the trial result. The Court subsequently explained that the Sixth Amendment guarantee of counsel was premised on the same concern. As a result, any claim of ineffective assistance of counsel requires a showing of prejudice. *See, e.g., Strickland*, 466

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[23] Although *Agurs* was based upon the Due Process Clause of the Fifth Amendment, the Court expressly extended its holding "to the comparable clause in the Fourteenth Amendment applicable to trials in state courts." 427 U.S. at 107.

U.S. at 694. "[T]he appropriate test for prejudice finds its roots in" *Agurs* and *Valenzuela-Bernal*. Thus, the defendant must show a reasonable probability of a more favorable result absent counsel's errors. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The Court found the "*Strickland* formulation of the *Agurs* test . . . sufficiently flexible" to cover every type of nondisclosure by the prosecutor, and adopted that test in *Bagley*, 473 U.S. at 682. *Amici* submit that this established test also contains sufficient flexibility to cover *Doyle* violations and urge its adoption in this case. Unless a reasonable probability appears that the petitioner would have received a more favorable result absent admission of the *Doyle* evidence, the outcome was reliable and he was not denied a fundamentally fair trial.

Reliance upon the "reasonable probability" test for determining the fairness of a trial is preferable to harmless error analysis, even that proposed by the Seventh Circuit. The test *amici* suggest is consistent with the approach followed by this Court in its recent due process cases. While "line drawing" and "precision" may be difficult in this area, the analysis *amici* propose is one with which the lower federal courts are already familiar. Its adoption thus permits habeas cases to be handled more expeditiously and with greater uniformity, all of which further ensures respect for the finality and presumptive correctness of state criminal convictions.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be affirmed.

Dated: September 10, 1992

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TODD A. BRECHT,

Petitioner,

vs.

GORDON A. ABRAHAMSON, Superintendent,
Dodge Correctional Institution,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit**

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Should the standard for determining whether constitutional error is harmless continue to be the reasonable doubt test of *Chapman* v. *California*?

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IN THE

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OCTOBER TERM, 1992

TODD A. BRECHT,

Petitioner,

vs.

GORDON A. ABRAHAMSON, Superintendent,
Dodge Correctional Institution,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the standard to be applied to determine whether constitutional error in a particular case is harmless. The current reasonable doubt standard allows too many reversals for unimportant errors. The resulting loss of valid conditions for unimportant errors is

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1. CJLF has received written consent from both parties to file this brief.

contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Petitioner Brecht was convicted of first degree murder for shooting and killing his brother-in-law, Roger Hartman. *State* v. *Brecht*, 421 N. W. 2d 96, 98 (Wis. 1988). At trial, Brecht put on the defense that the shooting was an accident. Amongst the evidence used to counter this defense was evidence that on three separate occasions Brecht had the opportunity to raise his story about the accidental shooting of his brother-in-law, but did not do so. See *id*., at 100-101. Each of these opportunities happened before Brecht's *Miranda* warnings. See *ibid*.

During Brecht's cross-examination and on closing argument, the district attorney mentioned that Brecht had never said to anyone before the trial that the shooting was accidental. *Brecht* v. *Abrahamson*, 944 F. 2d 1363, 1365 (CA7 1991).

The Wisconsin Court of Appeal found the district attorney's statements to be violations of *Doyle* v. *Ohio*. *Ibid*. The Wisconsin Supreme Court reinstated the conviction, finding *Doyle* error, but finding it harmless. See *id*., at 1365-1366. The federal district court granted Brecht's habeas petition, again finding *Doyle* error and concluding that it was not harmless. *Id*., at 1366. The Seventh Circuit found *Doyle* error but held it harmless under the standard of *Kotteakos* v. *United States*. *Id*., at 1375-1376.

SUMMARY OF ARGUMENT

Stare decisis does not preclude a re-examination of this Court's decision in *Chapman* v. *California*. *Stare decisis* is a policy designed to foster public respect for the law by preserving expectations and advancing the notion of a

coherent body of precedent. *Chapman* is not insulated from re-examination, because it invokes minimal reliance interests and is a constitutional decision.

The reasonable doubt standard of *Chapman* should be overruled. Reasonable doubt is a test appellate courts are ill-suited to apply. It interferes with the jury's findings, and it requires reviewing courts to make an extensive examination of the record.

The reasonable doubt standard is also too high. Properly applied, it is a rule of near automatic reversal. This can lead courts, including this one, to back away from the *Chapman* standard. Such backtracking can only cause confusion within the courts.

The time for retaining *Chapman* has passed. While reasonable doubt may have been necessary when states opposed federal authority, that is no longer the case. State courts can be trusted with a less strict standard.

The proper standard for harmless constitutional error is found in *Kotteakos* v. *United States*. The *Kotteakos* test provides a proper, congressionally-empowered compromise between the need to prevent technical reversal and the need to preserve the integrity of constitutional rules.

Whatever error, if any, that exists in the present case is harmless. The allegedly harmful statements were no more than trivial overstatements.

ARGUMENT

I. *Stare decisis* does not preclude a re-examination of *Chapman* v. *California*.

The Seventh Circuit's decision below demonstrates the weakness of the reasonable doubt standard of *Chapman* v. *California*, 386 U. S. 18 (1967). While the court below limited its holding to the collateral enforcement of prophylactic rules, its reasoning may be carried much further. If the *Chapman* standard may be questioned

under this limited circumstance, then a more general reappraisal of the harmless error standard is in order.

The first step in appraising whether the *Chapman* standard should be replaced is the doctrine of *stare decisis*. Refusing to overturn a decision because of *stare decisis* can be an act of judicial economy, avoiding a re-examination of the case by sticking to the narrower grounds of *stare decisis*.

But *stare decisis* is not a shield for the poorly reasoned or contradictory decision. It "is a principal of policy, and not a mechanical formula . . . ." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940). Therefore, *stare decisis* should not be viewed as a means of preserving particular decisions, but as the method of preserving the policies the doctrine serves.

A. Stare Decisis.

The fundamental purpose of *stare decisis* is to preserve the rule of law. See *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 700, 112 S. Ct. 2791, 2801 (1992) ("*Casey*"). This allows people to rely upon the validity of decisions in conducting their affairs, and it combats the belief that decisions are the personal whims of judges. See *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986). By allowing decisions to stay in place, a coherent body of precedent is created. This establishes the rule of law.

Thus, the most important role of *stare decisis* is preserving expectations. "*Stare decisis* provides some moorings so that men may trade and arrange their affairs with confidence. *Stare decisis* serves to take the capricious element out of law and give stability to society." Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949).

If people did not know what to expect from the courts, our lives, particularly in the commercial sphere, would become much more difficult. Contracts could become voided, the title could change hands, and money could be lost if precedent is overruled. See, *e.g.*, *United States* v.

Title Ins. & Trust Co., 265 U. S. 472, 486-487 (1924). Thus *stare decisis* is strongest when property and contract rights are involved. See *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2610 (1991).

In criminal cases, different interests are involved. While reliance is important in substantive criminal law, it is not protected through *stare decisis* but rather by limitations on retroactivity. See, *e.g.*, *Marks* v. *United States*, 430 U. S. 188, 196-197 (1977). In criminal procedure, reliance is almost entirely on the side of the prosecution, because only the prosecution's victories are subject to appellate or collateral attack. When a defendant wins an acquittal based upon an existing procedure, the Double Jeopardy Clause prevents reversal. Only in rarest situations, such as restrictions on immunized testimony, will a defendant's reliance interest be protected by *stare decisis*. Criminal procedure precedent favoring criminal defendants involves a more general interest in law. See *Vasquez* v. *Hillery*, *supra*, 474 U. S., at 265-266.

This interest, like reliance, varies in strength with the type of precedent. It is most important in those extremely rare cases involving matters of intense national controversy. In these cases, overruling even an obviously wrong decision may be too expensive to the country.

The Judiciary is the "least dangerous" of the branches because it has the least powers of compulsion, having "no influence over either the sword or the purse . . . ." See *The Federalist No. 78*, at 465 (A. Hamilton) (Rossiter ed. 1961). Instead, the courts must rely on their persuasion and prestige to insure popular acquiescence to their decisions. Thus the Court's power "lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands." *Casey*, *supra*, 120 L. Ed. 2d, at 707, 112 S. Ct., at 2814.

In order to preserve its power of persuasion, at times this Court will preserve some decisions it otherwise would overrule. This doctrine has two applications. First, when the number of decisions overturned has reached a saturation point, "a point beyond which frequent overruling would overtax the country's belief in the Court's good faith." *Id.*, at 708, 112 S. Ct., at 2815.

The other circumstance involves those rare cases of exceptional public controversy.

> "Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve an intensely divisive controversy . . . its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Ibid.*

In these cases, the need to maintain the public's belief in the rule of law can be overwhelming. When it resolves such controversies, any backtracking by the Court can be seen as "a breach of faith" with the rest of the public. *Id.*, at 709, 112 S. Ct., at 2816. Such a result would cause "profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law." *Ibid.*

Most decisions, however, are not so controversial. In most cases, the rule of law is meant to assure society that decisions are based in law, and not in proclivities of individuals. See *Vasquez* v. *Hillery*, *supra*, 474 U. S., at 265.

B. The Limits of Stare Decisis.

While *stare decisis* is an important doctrine serving a useful social policy, it does not have the same force as a statute or the Constitution. The Judiciary's role in our society is as an interpreter of laws. See *The Federalist No.*

78, at 467 (A. Hamilton) (Rossiter ed. 1961). Therefore, *stare decisis*, while respected, cannot deter this or any other court from its ultimate duty of interpreting the law. *Stare decisis* is the servant, not the master, of the law.

This Court has recognized that the doctrine does not have the force of a rule of law and may be overridden when appropriate. "Whether it [*stare decisis*] shall be followed or departed from is a question entirely within the discretion of the court . . . ." *Hertz* v. *Woodman*, 218 U. S. 205, 212 (1910). While it will be followed in most cases, this is only because usually "it is more important that the applicable rule of law be settled than it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting).

Perhaps the most important factor in limiting *stare decisis* is the ability of other bodies to overturn this Court's decisions. This Court is particularly reluctant to overturn its own statutory interpretations, because Congress "remains free to alter what [this Court has] done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989).

Constitutional cases are another matter. Because " 'correction through legislative action is practically impossible' " constitutional cases have much less precedential force than statutory cases. *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2610 (1991) (quoting *Burnet*, *supra*, 285 U. S., at 407 (Brandeis, J., dissenting)); see *Patterson*, *supra*, 491 U. S., at 172-173. Given the necessary tension between our democratic ideals and judicial review under the Constitution, see Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 695-696 (1976), this Court must be ready to re-examine its constitutional decisions in order to maintain the democratic nature of our society.

Refusing to re-examine an incorrect opinion that the public cannot overturn is corrosive to this Court's public respect. Thus the decision to uphold the incorrectly

decided *Lochner* v. *New York*, 198 U. S. 45 (1905) until 1937 helped to damage this Court as a public institution. See *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 705, 112 S. Ct. 2791, 2813 (1992). "Of course it is embarrassing to confess a blunder; it may prove even more embarrassing to adhere to it." *United States* v. *Bryan*, 339 U. S. 323, 346 (1950) (Jackson, J., concurring).

This Court is also more willing to re-examine decisions that have developed contradictions over time. Thus, this Court will not allow *stare decisis* to preserve inconsistent or difficult to administer decisions. See *Patterson*, *supra*, 491 U. S., at 173. Similarly, if the conditions that motivated a decision change, then there is good reason to overrule the prior decision. See *Casey*, *supra*, 120 L. Ed. 2d, at 700, 112 S. Ct., at 2809.

Stare decisis is also weaker in procedural cases. These decisions do not foster the same reliance interests. In criminal procedure there is minimal reliance interest, and nearly all of that is on the side of the prosecution. See part I, *ante*, at 5. Furthermore, changes in procedure usually will not invoke the same public reaction that occurs from changes in substantive law. Procedural rules typically matter only to litigants. As most people are spared the burden of litigation, changes in procedure are unimportant to most. No person could or should plan his life around potential litigation, especially criminal litigation. Unlike substantive decisions, rules of procedure have little effect on our daily lives.

The fact that the *stare decisis* is not a "mechanical rule" is demonstrated by the hierarchy within the doctrine. While some decisions are virtually etched in stone, others warrant more flexibility. For those cases less worthy of *stare decisis*, " 'the process of trial and error so fruitful in the physical sciences is appropriate also in the judicial function.' " *United States* v. *Scott*, 437 U. S. 82, 101 (1978) (quoting *Burnet*, *supra*, 285 U. S., at 406-408 (Brandeis, J., dissenting)).

C. Chapman as Precedent.

When deciding whether *stare decisis* should preserve a decision from re-examination, this Court "is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 700, 112 S. Ct. 674, 2808 (1992). This involves a look into the type of decision involved, the reliance interest it invokes and whether the decision involves a divisive public controversy. See part I A & B, *ante*, at 4-8. Under all of these factors, *Chapman* v. *California*, 386 U. S. 18 (1967) invokes minimal protection from *stare decisis*.

Chapman invokes minimal reliance interest. The reasonable doubt standard imposed by *Chapman* is not something people will rely upon in their daily affairs. Both sides in litigation have an interest in keeping the proceedings free of constitutional error. There is a strong incentive to avoid constitutional error favoring the other side. It is the nature of litigation that parties should try to correct error favoring their opponents at the trial level, instead of waiting for the appeal. At best, it is a very risky proposition to forego curing adverse constitutional error at trial.

Many constitutional rights can be waived by a failure to press for them at trial. See *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Furthermore, the notion of wily trial counsel allowing the opponent or the court to commit error at trial, so that reversal may be obtained upon appeal, is contrary to the premise behind harmless error rule. See *Kotteakos* v. *United States*, 328 U. S. 750, 759-760 (1946). Therefore, no litigant should allow adverse constitutional error to go unchallenged at trial in the hopes of obtaining a reversal. Any reliance on *Chapman* to reverse on the basis of an error which could have been

corrected at trial is not legitimate reliance, and it is not entitled to protection.

Chapman is also a constitutional decision. The *Chapman* Court was unclear on its authority for its decision. The most precise statement comes in the cryptic passage:

> "We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created by the Federal Constitution itself—is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule." *Chapman* v. *California*, 386 U. S. 18, 21 (1967).

An uncritical appraisal of this passage could lead an observer to conclude that *Chapman* is no more than a rule of court readily changed by Congress. This ignores the constitutional basis of this Court's authority in *Chapman*. The only authorities for overriding state laws are the Constitution, the laws enacted under it, and treaties. U. S. Const. art. VI, § 2. *Chapman* did not invoke any statute or treaty. The *Chapman* rule is either constitutionally based or it is illegitimate. Cf. *Chapman*, *supra*, 386 U. S., at 51 (Harlan, J., dissenting) (*Chapman* characterized as a "new constitutional doctrine").

Chapman's reference to the power of Congress to legislate in this area is hollow. When *Chapman* was decided, Congress had enacted a statute, 28 U. S. C. § 2111, that addressed harmless error. The *Chapman* Court recognized that section 2111 did not discriminate between constitutional and nonconstitutional error. 386 U. S., at 22. In *Kotteakos* v. *United States*, 328 U. S. 750, 764-765 (1946), this Court indicated that the predecessor to section 2111 might apply to constitutional error. *Kotteakos* also established a standard for determining the harmlessness of error under section 2111. *Id.*, at 765.

Yet *Chapman* did not rely on section 2111 to establish a harmless error rule. Its reference to the absence of "appropriate congressional action" indicates that section 2111 did not give the *Chapman* Court the authority to formulate a rule for harmless constitutional error. The break with section 2111 is completed by the adoption of the reasonable doubt standard, which is higher than the one used in *Kotteakos*. As the *Chapman* Court ignored the authority of section 2111 in this case, *Chapman* must be a constitutional decision.

The only "congressional action" *Chapman* would deem "appropriate" would be an act establishing the same high standard created in *Chapman*. It could not mean the lower standard supplied by section 2111 and *Kotteakos*. In order to replace *Chapman* with a lower standard, either *Chapman* will have to be overruled or the Constitution must be amended. Therefore, like other constitutional decisions, *Chapman* should be easier to modify or overrule under *stare decisis*. See *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2610 (1991).

Some constitutional decisions do warrant more *stare decisis* protection than others. These involve particularly divisive national controversies that this Court's decision has substantially resolved. See *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 708, 112 S. Ct. 2791, 2815 (1992). *Chapman* is not such a case. While it is important, the harmless error standard does not and is not likely to divide the country. It involves the sort of technical issue that the lay public is unlikely to understand well, if at all. Cf. Douglas, *supra*, 49 Colum. L. Rev., at 737. Changing *Chapman* will not erode the nation's confidence in the courts. Cf. *Casey*, *supra*, 120 L. Ed. 2d, at 708-709, 112 S. Ct., at 2815-2816.

II. The reasonable doubt standard of *Chapman* should be abandoned.

A. Appellate Courts and Reasonable Doubt.

The most evident problem with the *Chapman* standard is that reasonable doubt is a test appellate courts are particularly ill-suited to apply. Asking an appellate court to find that an error was harmless beyond a reasonable doubt comes perilously close to second-guessing the jury. While the reasonable doubt question goes to harmless error and not guilt, in practice, application of the *Chapman* standard is very similar to a re-examination of the jury's finding. Determining whether the State has demonstrated, beyond a reasonable doubt, that the error did not contribute to defendant's conviction frequently entails an examination of the strength of the case under the reasonable doubt standard.[2] See *United States* v. *Hasting*, 461 U. S. 499, 509 (1983). "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." *Rose* v. *Clark*, 478 U. S. 570, 579 (1986).

Appellate courts are not well-suited to make this type of finding. A reasonable doubt standard, if properly applied, imposes an enormous burden on reviewing courts. Diligent application of the reasonable doubt standard necessarily entails substantial work. Frequently, detailed examination of the entire record will be necessary to ascertain whether there is reasonable doubt. Cf. *Jackson* v. *Virginia*, 443 U. S. 307, 337 (1979) (Stevens, J., dissenting). The reasonable doubt finding in *Chapman* can be just as involved as the one for guilt.

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2. In some cases the entire record cannot be used to justify a finding of harmlessness. Where the error prevents the jury from considering some evidence such as an erroneous presumption, then the evidence not considered may not support a harmless error finding. See *Yates* v. *Evatt*, 114 L. Ed. 2d 432, 449-450, 111 S.Ct. 1884, 1893-1894 (1991).

> "This Court is far too busy to be spending countless hours reviewing trial transcripts in an effort to determine the likelihood that an error may have affected a jury's deliberations. In this case the parties did not provide us with a printed appendix containing any portion of the trial testimony or with any of the trial exhibits that are discussed at some length in the transcript. I have spent several hours reviewing the one copy of the trial transcript that has been filed with the Court. But I have not read all of its 1,013 pages, and I have read only a few of the 450 pages of the transcript of the suppression hearing. The task of organizing and digesting the testimony is a formidable one." *United States* v. *Hasting*, 461 U. S. 499, 516-517 (1983) (Stevens, J., concurring).

Finally, the *Chapman* standard's placement of the burden on the state is also contrary to good appellate procedure. Burdens of proof and presumptions are trial, not appellate tools. "These presumptions and burdens, which expedite the trial process of recreating the facts that lead to the litigation are unsuited to the appellate process of determining whether an error was harmless." R. Traynor, *The Riddle of Harmless Error* 25-26 (1970). By placing elements of the trial into an appellate process, the *Chapman* standard blurs the line between the appellate courts and the trial courts, further weakening the jury process.

B. The Chapman Standard Is Too High.

Setting the proper standard for harmless error can be tricky. Setting the standard too low can subvert the Constitution. See *Chapman* v. *California*, 386 U. S. 18, 23-24 (1967). Yet if the standard is too strict, then it can create contempt for the standard and for the Constitution it seeks to protect. *Chapman* errs too much towards this latter problem.

The single greatest problem with *Chapman* is that the standard, if diligently applied, requires near automatic reversal. See R. Traynor, *The Riddle of Harmless Error* 43-44 (1970). It is always difficult to overcome the test of reasonable doubt, a standard "approaching certainty." See *id.*, at 44.

The difficulty of passing the *Chapman* test is further compounded by the nature of the inquiry being made. *Chapman* does not involve the relatively straightforward question put before the jury over whether the prosecution proved beyond a reasonable doubt that defendant committed the charged crime. *Chapman* is less factual and more psychological. It does not allow the reviewing court to weigh the evidence itself, but instead requires it to gauge the error's impact on the mind of the average jury member. See *Harrington* v. *California*, 395 U. S. 250, 254 (1969); *Milton* v. *Wainwright*, 407 U. S. 371, 377-378 (1972). It is difficult to be nearly certain about such a secondhand conclusion.

The difficulty of finding harmless error under *Chapman* runs contrary to the doctrine of harmless error. The doctrine of harmless error came from our sense of justice. The rule of *per se* reversal that was adopted throughout much of this country was an extreme interpretation of an English decision, which was so contrary to prior common law precedent that Wigmore called it "heresy." See 1 J. Wigmore, *Evidence* § 21, at 888 (Tillers rev. 1983). This led to great injustices as many cases, particularly criminal convictions were reversed on technicalities. "All the sentiment is thrown to weight the scales for the criminal—that is, not for the mere accused, who may be assumed innocent, but for the man who upon the record plainly appears to be the offender that the jury has pronounced him to be." *Id.*, at 895. Similar sentiments led the states and Congress to enact harmless error rules. See *Kotteakos* v. *United States*, 328 U. S. 750, 759 (1946).

The sense of justice that motivates the harmless error doctrine will fuel substantial resistance to needless restrictions on a court's ability to find error harmless.

> "If courts conscientiously apply the *Chapman* test, they will usually find themselves compelled to balk at declaring a belief that there is no reasonable *possibility* that an error influenced the jury. The alternative is to give the test lip service while tacitly discounting it. The very severity of the test invites such discounting to preclude well nigh automatic reversal." Traynor, *supra*, at 44 (emphasis in original); see also Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. Pa. L. Rev. 15, 61, n. 126 (1976).

Trials are costly for the parties, the jurors, and society. See *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U. S. 548, 553 (1984). Retrials are even more costly. Retrial of a reversed conviction requires parties, witnesses, jurors, and courts "to repeat a trial that has once taken place." *United States* v. *Mechanik*, 475 U. S. 66, 72 (1986). This can be particularly burdensome to the victims who "may be asked to relive their disturbing experiences." *Ibid*. The passage of time makes retrial even costlier. As memories fade and witnesses disappear, conviction may be impossible on retrial. Even if there is a conviction, the delay impedes society's interests in retribution and deterrence. *Ibid*. "The doctrine of harmless error conserves judicial resources by obviating retrial for trivial mistakes." Note, *Harmful Use of Harmless Error in Criminal Cases*, 64 Cornell L. Rev. 538, 565 (1979). As *Chapman* will offend a court's sense of economy as well as its sense of justice, courts will be even more inclined to evade strict application of the reasonable doubt standard.

The difficulty courts have with applying the *Chapman* standard is demonstrated by this Court's harmless error cases. The *Chapman* Court criticized the California harmless error rule because it relied too much upon other

" 'overwhelming evidence' " of guilt. *Chapman*, *supra*, 386 U. S., at 23. Instead of looking at whether defendant was guilty in spite of the error, the *Chapman* test required courts to decide whether the error contributed to the conviction. *Id.*, at 26. But in *Harrington* v. *California*, *supra*, this Court began to abandon this central tenet of *Chapman*.

Harrington was one white man who was tried with three black men for attempted robbery and first degree murder. 395 U. S., at 252. At trial, the confessions of Harrington's two nontestifying codefendants were admitted in violation of *Bruton* v. *United States*, 391 U. S. 123 (1968). *Harrington*, *supra*, 395 U. S., at 252. Neither of these confessions implicated Harrington by name, but each referred to the fourth conspirator as the " 'white guy.' " *Id.*, at 253. The confessions were found harmless because they were cumulative and "the case against Harrington was so overwhelming . . . ." *Id.*, at 254.

Although the majority claimed it was not departing from *Chapman*, *ibid.*, the dissent claimed that *Chapman* had been overruled. See *id.*, at 255 (Brennan, J., dissenting). While *Chapman* may not have been dead, it was certainly maimed. It is difficult to see how two confessions stating that one white man and three black men committed the crime did not, beyond a reasonable doubt, contribute to the conviction of the one white man being tried along with three black men. See *id.*, at 257 (Brennan, J., dissenting); Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. L. & Criminology 421, 427 (1980). This is not to say that *Harrington* reached the wrong result. The evidence against Harrington was overwhelming and consequentially the error was trivial in the context of the trial. See *Harrington*, *supra*, 395 U. S., at 252-254. But the result cannot be reached without a move away from *Chapman*.

In *Schneble* v. *Florida*, 405 U. S. 427 (1972), the departure from *Chapman* continued. The strength of the

case without the error was the primary issue under harmless error analysis. "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect [of the error] is so insignificant by comparison" that the harmlessness of the error "is clear beyond a reasonable doubt." *Id.*, at 430. While the *Schneble* Court recognized the standard enunciated in *Chapman*, it continued this Court's move away from it. "Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required." *Id.*, at 432, compare with *Chapman*, *supra*, 386 U. S., at 26 (placing burden of proof on prosecution). Once again, this Court reached the correct result; the *Bruton* error was unimportant in the context of the rest of the case. See *Schneble*, *supra*, 405 U. S., at 430-431. But once again, this Court departed from *Chapman* to reach the proper result.

The practice established in *Harrington* and *Schneble*, looking at the strength of the prosecution's case without the error, is now the standard analysis. See, *e.g.*, *Delaware* v. *Van Arsdall*, 475 U. S. 673, 684 (1986); *Arizona* v. *Fulminante*, 113 L. Ed. 2d 302, 323-325, 111 S. Ct. 1246, 1258-1260 (1991). If this Court has difficulty reconciling *Chapman* with the principle of harmless error, then other courts must have similar qualms.

In *Yates* v. *Evatt*, 114 L. Ed. 2d 432, 111 S. Ct. 1884 (1991) this Court made some effort to get closer to the original jurisprudence of *Chapman*. The *Yates* Court disavowed any notion drawn from this Court's prior cases that harmless error may be found in erroneous presumption cases by examining the entire record. *Id.*, at 449-450, 111 S. Ct., at 1893-1894. The *Yates* Court recognized that *Chapman*'s emphasis was on the error's effect on the jury, not on the strength of the case. Where an erroneous presumption kept a jury from considering certain evidence, that evidence cannot be used as a basis for harmless error. *Id.*, at 450-451, 111 S. Ct., at 1894-1895.

The *Yates* Court still gave the strength of the case great importance. "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question as revealed in the record." *Id.*, at 449, 111 S. Ct., at 1893. The inference from *Yates* is that where the jury did consider all evidence, then the entire record may be used to overcome error. See *id.*, at 450, 111 S. Ct., at 1894. Thus, sufficiently overwhelming evidence should be able to overcome error even after *Yates*, provided that the jury considered it.

The problem courts have with *Chapman* does not stem from an unwillingness to enforce the Constitution, but from the difficulty of applying the exacting reasonable doubt standard to the very difficult question of the error's impact on jury deliberations. This Court has replaced this question with the more factual, and thus less difficult inquest into the strength of the case against the defendant. While this test may work its own justice, it is not an acceptable solution. Courts should not say one thing and do another. *Chapman* should be replaced with a lower and more workable standard, one that more accurately reflects what courts are *really* doing. Cf. *Wainwright* v. *Sykes*, 433 U. S. 72, 94-95 (1977) (Stevens, J., concurring) (*Fay* v. *Noia* standard should be replaced because courts were not really using it).

"No judge in so extended a trial can avoid on occasion rulings that on reflection he will see to have been wrong; but, unless they cut off some really substantial aspect of the truth, or let in too distracting issues, they are not important." *United States* v. *White*, 124 F. 2d 181, 186 (CA2 1941) (Hand, J.).

Learned Hand's admonition is even more important now. In the last few decades constitutional law has become immensely more complicated. See *Doggett* v. *United States*, 120 L. Ed. 2d 520, 539, 112 S. Ct. 2686, 2699 (1992) (Thomas, J., dissenting). Instead of the few, simple

rules actually adopted in 1791, the Bill of Rights has been expanded by decision into a "detailed Code of Criminal Procedure, to which a new chapter is added every year." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 155 (1970) (footnote omitted). *Chapman* might have been appropriate long ago when constitutional law was less complicated, but today, where constitutional error is much more pervasive, a less harsh standard is necessary.

C. Chapman Is Inconsistent.

The inconsistencies generated by *Chapman* come from two main sources. First, the harshness of reasonable doubt standard makes courts unwilling to apply it literally. Therefore, subsequent cases have moved away from the harsh test of *Chapman*. See part II B, *ante*, at 15-19.

The second source of conflict comes from the *Chapman* Court's purported application of *Fahy* v. *Connecticut*, 375 U. S. 85 (1963). The *Fahy* Court found that constitutional error prejudiced defendant because there was "a *reasonable possibility* that the evidence complained of might have contributed to the conviction." *Id.*, at 86-87 (emphasis added). The *Chapman* Court claimed to be adopting this standard when it enunciated its reasonable doubt standard, 386 U. S., at 24, but it is difficult to reconcile these two standards.

The reasonable doubt standard is the highest one in the law, "approaching certainty." See R. Traynor, *The Riddle of Harmless Error* 44 (1970). *Fahy*'s "reasonable possibility" standard is more equivocal than *Chapman*. Even when worded in the negative terms of *Chapman* "whether there was no reasonable possibility that the error contributed to the jury's verdict" the *Fahy* standard is less stringent.

Reasonable doubt protects each individual from criminal conviction unless the trier of fact is convinced of the guilt "with utmost certainty." *In re Winship*, 397 U. S.

358, 364 (1970). This is a "subjective state of near certitude." *Jackson* v. *Virginia*, 443 U. S. 307, 315 (1979). When one deals in "possibility," certainty is not necessarily certain.

The difference between *Fahy* and *Chapman* would be academic had *Chapman* formally abandoned *Fahy*. As the *Chapman* Court did not, a court could claim to be applying the *Chapman* standard while applying the less rigorous *Fahy* test. This has been done by the Eleventh Circuit. In *Hutchins* v. *Wainwright*, 715 F. 2d 512, 517 (CA11 1983), the court equated the *Fahy* test with the *Chapman* standard. As *Chapman* "purported merely to apply the standard previously established in *Fahy*" the *Hutchins* opinion was deemed acceptable. *United States* v. *Lehder-Rivas*, 955 F. 2d 1510, 1517, n. 3 (CA11 1992). Until the reasonable doubt standard of *Chapman* and its improper reliance upon *Fahy* are removed, contradictions like this will be possible and legal.

D. Chapman Is Unnecessary.

Chapman v. *California*, 386 U. S. 18 (1967) was decided in the middle of this Court's criminal procedure revolution. Landmark cases such as *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), *Mapp* v. *Ohio*, 367 U. S. 643 (1961), and *Miranda* v. *Arizona*, 384 U. S. 436 (1966) had only recently been decided. These and other revolutionary changes in criminal procedure that occurred during the 1960's caused some resentment in the state courts. Their criminal cases were now subject to a much higher level of federal scrutiny than before. Harmless error could have been a way for state courts to avoid this Court's decisions. By forcing states to adopt a high standard for harmless constitutional error, *Chapman* helped ensure that state courts did not subvert the Constitution. Cf. Mouse, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 Minn. L. Rev. 519, 530, n. 76 (1969) (*Chapman* standard is stricter than most state tests).

Chapman was decided when federal authority was still bitterly resisted. Only a few years earlier a state court of general jurisdiction answered a federal constitutional objection by saying "that the 'case [was] not being tried under the Federal Constitution.' " *Estes* v. *Texas*, 381 U. S. 532, 536 (1965). Furthermore, the "massive resistance" of some states to the federal authority to enforce civil rights was not yet dead. Therefore, the *Chapman* Court may have had good reason to distrust some state courts.

Fortunately, times have changed. These problems are inconceivable today. The supremacy of federal law is universally acknowledged and is routinely applied in the state courts. See *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976); *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 210-211, 110 S. Ct. 2822, 2831 (1990). State courts may interpret the Constitution in ways later disapproved, but they no longer refuse to follow it.

While the times have changed, *Chapman* has not. Its overly restrictive standards still needlessly prevent harmless error findings. State courts are now as worthy to trust with the Constitution as any federal court. They "are no less under duty to observe the United States Constitution than is this Court." *Williams* v. *Kaiser*, 323 U. S. 471, 482 (1945) (Frankfurter, J., dissenting). *Chapman* should not be retained out of any unwarranted fear of state courts.

The two other possible reasons for retaining the *Chapman* standard do not withstand scrutiny. The high *Chapman* standard could be justified on the ground that constitutional rights are more important than lesser rights, and thus warrant a higher standard for harmless error. This confuses the type of error with whether the error actually was harmless. Nonconstitutional error can be just as prejudicial as constitutional violations. See Note, *Harmful Use of Harmless Error in Constitutional Cases*, 64 Cornell L. Rev. 538, 551 (1979). "Fundamental" and "constitutional" ceased to be synonymous many, many

years ago. See *Rose* v. *Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting).

Kotteakos and *Chapman* amply illustrate that constitutional rules are not inherently more "important" than nonconstitutional rules. The error in *Kotteakos* was in the instruction on conspiracy. It went to the very heart of the case. The trial court flatly and wrongly told the jury that there was one large conspiracy, when in reality there were many separate, smaller conspiracies. *Kotteakos* v. *United States*, 328 U. S. 750, 767-768 (1946). Such an error raises a grave possibility of conviction of an innocent person, because the overt act of one conspirator may be imputed to another. *Id*., at 771.

Chapman, in contrast, involves a rule with minimal relation to accuracy of the verdict. The fact of defendant's refusal to testify is perfectly obvious to the jury. *Griffin* v. *California*, 380 U. S. 609, 621 (1965) (Stewart, J. dissenting, joined by White, J.) The inference drawn by the former California rule is logically valid and had been sanctioned by a host of authorities. *Id*., at 622. The *Griffin* rule is based on an external policy unrelated to the accuracy of the trial, and it is an extreme extrapolation of that policy. To say that comment on failure to testify is a higher order of error than grossly wrong instruction on the nature of the crime would be patently absurd. Yet *Chapman* assigns a higher harmless error standard without regard to the importance of the error.

Furthermore, the high *Chapman* standard can work to denigrate constitutional rights, to avoid the strictness of the *Chapman* test. See part II C, *ante*, at 15. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." R. Traynor, *The Riddle of Harmless Error* 50 (1970).

The other reason given to support the *Chapman* test is that the reasonable doubt standard is necessary to preserve defendant's right to a finding of guilt beyond a

reasonable doubt under *In re Winship*, 397 U. S. 358 (1970). See Saltzburg, *The Harm of Harmless Error*, 59 Va. L. Rev. 988, 991 (1973). This rationale cannot save *Chapman*. *Winship* was decided after *Chapman*, thus the right announced six years later in *Winship* was an unlikely motivation for the *Chapman* Court. Furthermore, the *Chapman* standard actually interferes with jury decisions. The high standard frequently requires a detailed examination of the trial record which creates an ever present danger of appellate second-guessing of the jury's verdict. See part II A, *ante*, at 12-13.

Chapman's reasonable doubt standard may have once served a useful purpose. It no longer does. It is impractical to administer, too difficult to meet, and inconsistent with other precedent. The Seventh Circuit has refused to extend the *Chapman* standard to violations of prophylactic rules on habeas corpus. *Brecht* v. *Abrahamson*, 944 F. 2d 1363, 1375 (CA7 1991). *Amicus* submits that it is better to overrule an unprincipled decision than simply to refuse to extend it. "Wisdom too often never comes, and so one ought not to reject it merely because it comes too late." *Wolf* v. *Colorado*, 338 U. S. 25, 47 (1949) (Rutledge, J., dissenting).

III. The standard of *Kotteakos* v. *United States* is the proper standard for replacing *Chapman*.

Congress has mandated the proper standard for determining harmless error in 28 U. S. C. § 2111.[3] This statute and the cases interpreting it, *Kotteakos* v. *United States*, 328 U. S. 750 (1946) and *United States* v. *Lane*, 474 U. S. 438 (1986), provide a flexible, practical standard that

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3. "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

strikes a proper balance between preserving the rule of law and preventing unnecessary retrials.

The *Kotteakos* Court interpreted the predecessor to section 2111, former 28 U. S. C. § 391, 40 Stat. 1181. The Court set out to strike a proper balance, disregarding unimportant error while maintaining the integrity of the law. *Kotteakos* started by recognizing the purpose behind harmless error. Before the harmless error rule took hold, the frequency of reversal was so great "that criminal trial became a game for sowing reversible error in the record . . . ." 328 U. S., at 759. Harmless error was meant to end the game playing and close the loopholes. See *id.*, at 759-760.

These principles spurred Congress to action, and this Court kept them in mind when interpreting the statute. It recognized that hard and fast rules could not work well in an area heavily dependent upon the facts of each case. *Id.*, at 762. The Court also understood appellate courts could not determine guilt or innocence. *Id.*, at 763. But courts still had to assess the impact of the error on the jury's decision. *Id.*, at 764. The case by case nature of harmless error also mitigated against any systematic use of presumptions. The reviewing court had to look to the particular error in the setting of the particular case before it. See *id.*, at 765-766.

From these principles the following standard emerged.

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had *substantial influence*. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.*, at 765 (emphasis added).

This standard has several advantages over any competitors. It is a lower standard than the reasonable doubt standard of *Chapman*. See *Lane*, *supra*, 474 U. S., at 460-461 (Brennan, J., concurring in part and dissenting in part). Therefore, it will avoid many of the problems

associated with the *Chapman* standard. It will be less burdensome to apply than *Chapman*, as reviewing courts will not need to make the detailed inquiry of the record necessary to remove all reasonable doubt. See part II A, *ante*, at 12-13. Applying the less strict *Kotteakos* standard will promote the social good of fewer reversals for unimportant errors and make courts more willing to apply this Court's harmless error standard. See part II C, *ante*, at 13-19. Thus, applying *Kotteakos* instead of *Chapman* may actually lead to a greater respect for constitutional rights. Cf. R. Traynor, *The Riddle of Harmless Error* 50 (1970).

Another crucial advantage of *Kotteakos* is that it comes with congressional authority. *Kotteakos* only interpreted the predecessor to section 2111. The difference between section 2111 and former section 391 does not undermine the *Kotteakos* test. If anything, the new statute provides a less restrictive definition of harmless error. Section 2111 removes the qualifier "technical" from the statute, providing possibly greater scope for harmless error. See *Lane*, *supra*, 474 U. S., at 448. In any event, *Kotteakos* supplies the current standard for nonconstitutional harmless error in federal courts. See *id.*, at 448-449.

Some will object to *Kotteakos* on the ground that it was never meant to apply to constitutional error. See *Lane*, *supra*, 474 U. S., at 460-461 (Brennan, J., concurring in part and dissenting in part). *Kotteakos* did not deal with a constitutional error, but involved a variance between the proof at trial and the charge in the indictment. See 328 U. S., at 755. Thus any statements in *Kotteakos* on constitutional error are no more than dicta. See *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399-400 (1821).

What the *Kotteakos* Court did say about constitutional error was that if error had little effect on the jury "the judgment should stand except *perhaps* where the departure is from a constitutional norm or a specific command of Congress." *Kotteakos*, *supra*, 328 U. S., at 764-765 (emphasis added) (footnote omitted). The use of the equivo-

cal "perhaps" indicates *Kotteakos* could be used for harmless constitutional error. Footnote 19, which came after the word "norm" in the passage quoted above is no more restrictive. It states that cases have been reversed for "forced confessions . . . although on other evidence guilt might be taken to be clear." *Id.*, at 765, n. 19. This dealt with just one category of error that, until *Arizona* v. *Fulminante*, 113 L. Ed. 2d 302, 331-332, 111 S. Ct. 1246, 1265-1266 (1991), had not been considered to be subject to harmless error analysis.[4] See *Payne* v. *Arkansas*, 356 U. S. 560, 567-568 (1958).

Kotteakos did not need to dwell on constitutional error because at that time constitutional law was much less complicated. Today, however, the Constitution has become a detailed code of criminal procedure. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 155-156 (1970). Many of these new rights now protected are far from fundamental. See *Rose* v. *Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting). Constitutional law needs the *Kotteakos* standard much more today than it did in 1949. See part II D, *ante*, at 21.

The other reason not to adopt *Kotteakos*, that the Constitution deserves more protection, is dealt with in part II, *ante*, at 20-23, which dismisses this argument as a reason for retaining the *Chapman* standard. This argument also denigrates the protection offered by *Kotteakos*. As the Court below noted, it is strict enough to protect federal statutes and rules in federal trials. See Pet. App. 12d. This Court has thought enough of *Kotteakos* to apply

4. Another possible objection, that adopting the *Kotteakos* standard would make all constitutional rights subject to harmless error, is meritless. This Court only needs to adopt the *Kotteakos* standard for those constitutional errors that can be harmless. Those rights concerning "the framework within which the trial proceeds," *Arizona* v. *Fulminante*, 113 L. Ed. 2d 302, 331, 111 S. Ct. 1246, 1265 (1991) need not be subject to harmless error.

it to the harmless error rule of the Federal Rule of Criminal Procedure 52(a). See *Lane*, *supra*, 474 U. S., at 449. Federal rules and statutes have not collapsed because of *Kotteakos*, and neither will the Constitution. Courts today will not use harmless error to avoid the Constitution, see part II D, *ante*, at 20-23, and they should be given a chance to apply this superior standard.

Adopting the *Kotteakos* rule has other incidental benefits. It will lessen the number of standards for harmless error, a desirable simplification of the law. See Traynor, *supra*, at 48. It is also a standard federal courts are used to applying, thus lessening the costs of transition from *Chapman*. But the primary reason for adopting *Kotteakos* is respect. Respect for the statute enacted by Congress, respect for the courts that apply the complex creature our constitutional law has become, and respect for trials that are fundamentally fair.

IV. What "error" there was, if any, is harmless.

The present case demonstrates the difficulty of applying the exacting standard of *Chapman* to alleged constitutional error. At trial, three people testified that they had conversations with petitioner and he never mentioned shooting Roger Hartman to any of them. See *State* v. *Brecht*, 421 N. W. 2d 96, 100-101 (Wis. 1988). All of these statements occurred before any *Miranda* warnings. See *ibid*. Admission of all three was clearly constitutional. See *id*., at 102. Comment on Brecht's failure to mention the accident on each of these three occasions would have been entirely proper.

The alleged violations of *Doyle* v. *Ohio*, 426 U. S. 610 (1976) occurred when the prosection made several broad references to the fact that Brecht had never told his story until the trial. The prosecutor did not point out that Brecht had been silent after being given his *Miranda* warnings at arraignment. See *Brecht*, *supra*, 421 N. W. 2d,

at 103. The inference that petitioner did not talk after *Miranda* warnings should not constitute a *Doyle* violation.[5]

In *Doyle*, the only silence referred to by the prosecution was that which occurred after defendant's arrest and *Miranda* warnings. See *Doyle*, 426 U. S., at 612-614. In this case, the prosecution stated that Brecht had never told his story until trial, he was not punishing petitioner for heeding the *Miranda* warnings, but for his failure to mention the shooting to people he talked to before the *Miranda* warnings. It is unlikely that the prosecution even cared about the post-*Miranda* silence. The testimony of the three witnesses was much more damaging than Brecht's silence after his initial appearance. Had the prosecutor simply changed the wording of the offending statements to refer only to the testimony of the three witnesses, the statements would have lost none of their relevance and been completely insulated from *Doyle* attack. The present case involves a poor use of *Doyle*. It was meant to protect *Miranda*'s guarantee of silence, not to correct a prosecutor's syntax.

The fact that courts have found that this violated *Doyle* shows how technical constitutional criminal procedure has become. The district attorney was cognizant of *Doyle* error and took steps to avoid it. This must be why he introduced evidence that Brecht had not been given his *Miranda* warnings after the arrest. See *Brecht*, *supra*, 421 N. W. 2d, at 100-101. Yet the district attorney was tripped up because of subsequent slight over-statements constituting a few lines in a 900-page manuscript. Law as technical as this needs a less demanding harmless error standard.

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5. The comment in this case is strongly analogous to that in *United States* v. *Hasting*, 461 U. S. 499 (1983), where Justice Stevens found no *Griffin* error. *Id.*, at 512 (concurring in the judgment). The majority did not consider that question properly before the Court, but noted that Justice Stevens "may well be correct." *Id.*, at 506, n. 4.

Even if this was *Doyle* error, it was harmless, even under *Chapman*. The fact that two of the four courts that reviewed this case did not find it harmless speaks volumes about the problems with *Chapman*. Whatever prejudice that came from the inference of post-*Miranda* silence was overwhelmed by the evidence of Brecht's failure to bring up his story during three separate conversations. Thus, the alleged *Doyle* error was not prejudicial and therefore harmless beyond a reasonable doubt.

Harmless error is supposed to "promote[] public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986). In the present case, two courts applying *Chapman* have allowed the prosecution to be tripped up in, at best, a hypertechnical violation of *Doyle*. If *Chapman* can allow this to happen, then it makes a mockery of harmless error.

CONCLUSION

The judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

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Respectfully submitted,

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